



Code of Federal Regulations

13

Revised as of January 1, 2000

Business Credit and Assistance

Containing a Codification of documents
of general applicability and future effect

As of January 1, 2000

With Ancillaries

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Cite this Code: CFR

*To cite the regulations in
this volume use title,
part and section num-
ber. Thus, 13 CFR
101.100 refers to title 13,
part 101, section 100.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

| | |
|--------------------------------|-----------------|
| Title 1 through Title 16..... | as of January 1 |
| Title 17 through Title 27..... | as of April 1 |
| Title 28 through Title 41..... | as of July 1 |
| Title 42 through Title 50..... | as of October 1 |

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

HOW TO USE THE CODE OF FEDERAL REGULATIONS

The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, January 1, 2000), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

EFFECTIVE AND EXPIRATION DATES

Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1986, consult either the List of CFR Sections Affected, 1949-1963, 1964-1972, or 1973-1985, published in seven separate volumes. For the period beginning January 1, 1986, a "List of CFR Sections Affected" is published at the end of each CFR volume.

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What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR part 51 are met. Some of the elements on which approval is based are:

- (a) The incorporation will substantially reduce the volume of material published in the Federal Register.
- (b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.
- (c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, Washington DC 20408, or call (202) 523-4534.

CFR INDEXES AND TABULAR GUIDES

A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I). A list of CFR titles, chapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of "Title 3—The President" is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

REPUBLICATION OF MATERIAL

There are no restrictions on the republication of material appearing in the Code of Federal Regulations.

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For a legal interpretation or explanation of any regulation in this volume, contact the issuing agency. The issuing agency's name appears at the top of odd-numbered pages.

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RAYMOND A. MOSLEY,

Director,

Office of the Federal Register.

January 1, 2000.

THIS TITLE

Title 13—BUSINESS CREDIT AND ASSISTANCE is composed of one volume. This volume contains chapter I—Small Business Administration, chapter III—Economic Development Administration Department of Commerce, chapter IV—Emergency Steel Guarantee Board, and chapter V—Emergency Oil and Gas Guarantee Board. The contents of this volume represent all current regulations codified under this title of the CFR as of January 1, 2000.

For this volume, Melanie L. Marcec was Chief Editor. The Code of Federal Regulations publication program is under the direction of Frances D. McDonald, assisted by Alomha S. Morris.

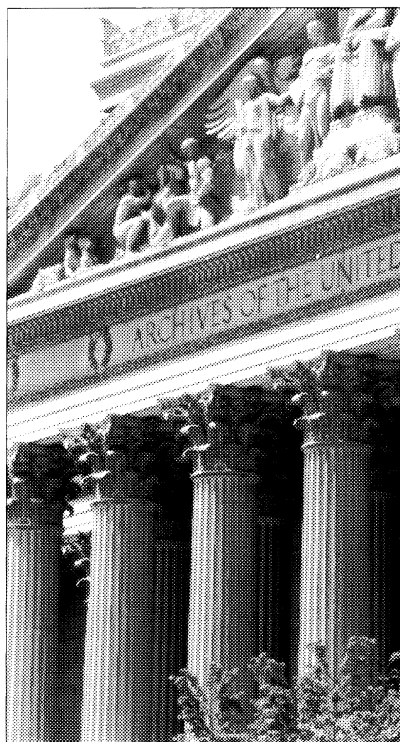
if any changes have been made to the *Code of Federal Regulations* or what documents have been published in the *Federal Register* without reading the *Federal Register* every day? If so, you may wish to subscribe to the LSA (List of CFR Sections Affected), the *Federal Register Index*, or both.

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CHAPTER I—SMALL BUSINESS ADMINISTRATION

EDITORIAL NOTE: The Small Business Administration has asked the Director of the Federal Register to inform users of this chapter that parts 143, 145, and 146 are common rule regulations that cannot be amended by the Small Business Administration unilaterally.

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ABBREVIATIONS USED IN THIS CHAPTER:

SBA=Small Business Administration.
 SBID=The Small Business Investment Division of SBA.
 RFC=Reconstruction Finance Corporation.

CROSS REFERENCE: For regulations of the Securities and Exchange Commission, see 17 CFR, Chapter II.

PART 101—ADMINISTRATION

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- 101.100 What is the purpose of SBA?
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- 101.400 What is the purpose of this subpart?
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- 101.402 What procedures apply to the selection of SBA programs and activities?
- 101.403 What are the notice and comment procedures?
- 101.404 How does the Administrator receive comments?
- 101.405 How does the Administrator respond to comments?
- 101.406 What are the Administrator's responsibilities in interstate situations?
- 101.407 May the Administrator waive these regulations?

AUTHORITY: 5 U.S.C. 552 and App. 3, secs. 2, 4(a), 6(a), and 9(a)(1)(T); 15 U.S.C. 633, 634, 687; 31 U.S.C. 6506; 44 U.S.C. 3512; E.O. 12372 (July 14, 1982), 47 FR 30959, 3 CFR, 1982 Comp., p. 197, as amended by E.O. 12416 (April 8, 1983), 48 FR 15887, 3 CFR, 1983 Comp., p. 186.

SOURCE: 61 FR 2394, Jan. 26, 1996, unless otherwise noted.

Subpart A—Overview

§ 101.100 What is the purpose of SBA?

The U.S. Small Business Administration (SBA) aids, counsels, assists, and protects the interests of small business concerns, and advocates on their behalf within the Government. It also helps victims of disasters. It provides financial assistance, contractual assistance, and business development assistance. For a more detailed description of the functions of SBA see The United States Government Manual, a special publication of the FEDERAL REGISTER, which is available from Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954.

§ 101.101 Who manages SBA?

(a) An Administrator, appointed by the President with the advice and consent of the Senate, manages SBA. The Administrator—

(1) Is responsible to the President and Congress for exercising direction, authority, and control over SBA.

(2) Determines and approves all policies covering SBA's programs to aid, counsel, assist, and protect the interests of the nation's small businesses.

(3) Employs or appoints employees necessary to implement the Small Business Act, as amended, the Small Business Investment Act, as amended, and other laws and directives.

(4) Delegates certain activities, by issuing regulations or otherwise, to Headquarters and field positions.

(b) A Deputy Administrator, appointed by the President with the advice and consent of the Senate, serves as Acting Administrator during the absence or disability of the Administrator or in the event of a vacancy in the Office of the Administrator.

§ 101.102 Where is SBA's Headquarters located?

The Headquarters of SBA is at 409 3rd Street, SW., Washington, DC 20416.

§ 101.103

§ 101.103 Where are SBA's field offices located?

A list of SBA's field offices with addresses, phone numbers and jurisdictions served is periodically published in the FEDERAL REGISTER. You can also obtain the address and phone number of an SBA office to serve you by calling 1-800-8-ASK-SBA or 1-800-827-5722.

§ 101.104 What are the functions of SBA's field offices?

(a) *Regional offices.* Regional offices are managed by a Regional Administrator who is responsible to the Administrator and to the Associate Administrator for Field Operations. They are located in major cities and have geographical boundaries which cover multi-state areas. Regional offices exercise limited authority over field activities within their region.

(b) *District offices.* District offices are managed by a District Director and are located in cities within a region. District offices are responsible to Headquarters, the Associate Administrator for Field Operations, and to a regional office. Within their delegated authority, district offices have authority for—

(1) Conducting all program delivery activities within the district boundaries;

(2) Supervising all branch offices located within the district boundaries; and

(3) Providing subordinate branch offices with the technical capability necessary to execute assigned programs.

(c) *Branch offices.* Branch offices are managed by a Branch Manager and are located in cities within a district. Branch offices are responsible to the district office within whose boundaries it is located. Branch offices execute one or more elements of the business or disaster loan programs and have limited authority for program execution.

(d) *Disaster area offices.* Disaster area offices are managed by Area Directors and are located in cities within defined geographical areas. Disaster area offices are responsible to Headquarters and provide loan services to victims of declared disasters. Temporary disaster offices are often established in areas where disasters have occurred.

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(e) *Responsibilities.* Each field office has responsibilities within a defined geographical area as periodically set forth in the FEDERAL REGISTER.

§ 101.105 Who may use SBA's official seal and for what purposes?

(a) The SBA's seal shall be in a manner and form set forth as follows:



(b) The Administrator, Deputy Administrator, General Counsel, Assistant Administrator for Administration, Assistant Administrator for Hearings and Appeals, Associate Administrator for Minority Enterprise Development, Regional Administrators, District Directors, Branch Managers, the Inspector General, and Disaster Area Directors are authorized to—

(1) Certify and authenticate originals and copies of any books, records, papers, or other documents on file within SBA, or extracts taken from them.

(2) Certify the nonexistence of records.

(3) Affix the Seal of SBA to all such certifications for those purposes authorized by 28 U.S.C. 1733.

§ 101.106 Does Federal law apply to SBA programs and activities?

(a) SBA makes loans and provides other services that are authorized and executed under Federal programs to achieve national purposes.

(b) The following are construed and enforced in accordance with Federal law—

(1) Instruments evidencing loans;

Small Business Administration

§ 101.201

(2) Security interests in real or personal property payable to or held by SBA or the Administrator such as promissory notes, bonds, guarantee agreements, mortgages, and deeds of trust;

(3) Other evidences of debt or security;

(4) Contracts or agreements to which SBA is a party, unless expressly provided otherwise.

(c) To the extent feasible, SBA uses local or state procedures, especially for recordation and notification purposes, in implementing and facilitating SBA's loan programs. This use of local or state procedures is not a waiver by SBA of any Federal immunity from any local or state control, penalty, tax, or liability.

(d) No person, corporation, or organization that applies for and receives any benefit or assistance from SBA, or that offers any assurance or security upon which SBA relies for the granting of such benefit or assistance, is entitled to claim or assert any local or state law to defeat the obligation incurred in obtaining or assuring such Federal benefit or assistance.

§ 101.107 What SBA forms are approved for public use?

(a) SBA uses forms approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), as amended. You may obtain approved forms for use by the public when applying for or obtaining SBA assistance, or when providing services for SBA, from any field office (see § 101.103). You may also use forms which you have prepared yourself, or have obtained from another source, if those forms are identical in every respect to the forms approved by OMB for the same purpose.

(b) Any member of the public who has reason to believe any SBA office or agent is in violation of the Public Protection Clause of the Paperwork Reduction Act (44 U.S.C. 3512 and see 5 CFR 1320.6) should notify SBA. Direct such comments to the Assistant Administrator for Administration at 409 3rd Street, SW., Washington, DC 20416.

§ 101.108 Has SBA waived any of the public participation exemptions of the Administrative Procedure Act?

Yes. Despite these exemptions, SBA will follow the public participation requirements of the Administrative Procedure Act, 5 U.S.C. 553, in rulemakings relating to public property, loans, grants, benefits, or contracts.

§ 101.109 Do SBA regulations include the section headings?

Yes. All SBA regulations must be interpreted as including the section headings.

Subpart B—Employment of Private Counsel

§ 101.200 When does SBA hire private counsel?

(a) *Business loans.* SBA may hire private counsel to represent it in regard to business loans when the volume of activity in an area is not sufficient to require a full-time SBA employee, or the area is too remote for economical use of a full-time SBA employee.

(b) *Disaster loans.* SBA may hire private counsel in regard to disaster loans when the disaster presents an emergency and a volume of activity that cannot be promptly and economically serviced by available SBA employees.

§ 101.201 What are the minimum terms of private counsel's employment?

(a) Private counsel must perform all requested work in compliance with SBA's regulations, policies, and instructions, and take such action as is legally required under the Small Business Act, the Small Business Investment Act, and other laws applicable to SBA.

(b) Private counsel must adhere to the highest standards of professional conduct and maintain confidentiality appropriate to the attorney-client relationship.

(c) Private counsel acts under the supervision of the SBA General Counsel (and designees).

(d) Private counsel usually is compensated at an hourly rate as approved by SBA. Contingency fee agreements may be used if approved by the General Counsel.

(e) Either party may terminate the employment upon written notice.

Subpart C—Inspector General

§ 101.300 What is the Inspector General's authority to conduct audits, investigations, and inspections?

The Inspector General Act of 1978, as amended (5 U.S.C. App. 3) authorizes SBA's Inspector General to provide policy direction for, and to conduct, supervise, and coordinate such audits, investigations, and inspections relating to the programs and operations of SBA as appears necessary or desirable.

§ 101.301 Who should receive information or allegations of waste, fraud, and abuse?

The Office of Inspector General should receive all information or allegations of waste, fraud, or abuse regarding SBA programs and operations.

§ 101.302 What is the scope of the Inspector General's authority?

To obtain the necessary information and evidence, the Inspector General (and designees) have the right to:

- (a) Have access to all records, reports, audits, reviews, documents, papers, recommendations, and other materials available to SBA and relating to SBA's programs and operations;
- (b) Require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence;
- (c) Administer oaths and affirmations or take affidavits; and
- (d) Request information or assistance from any Federal, state, or local government agency or unit.

§ 101.303 How are Inspector General subpoenas served?

- (a) Service of subpoenas may be effected by any of the following means—
 - (1) If by mail, a copy of the subpoena must be addressed to the person, partnership, corporation, or unincorporated association to be served at a residence or usual dwelling place, or a principal office or place of business, and mailed first class by registered or certified mail (postage prepaid, return receipt requested), or by a commercial or U.S.

Postal Service overnight or express delivery service.

- (2) If by personal delivery, a copy of the subpoena must be delivered to the person to be served, or to a member of the partnership to be served, or to an executive officer or a director of the corporation or unincorporated association to be served, or to a person authorized by appointment or by law to receive process for the person or entity named in the subpoena.

- (3) If by delivery to an address, a copy of the subpoena must be left at the principal office or place of business of the person, partnership, corporation, or unincorporated association to be served, or at the residence or usual dwelling place of the person, member of the partnership, or officer or director of the corporation or unincorporated association to be served, with someone of suitable age and discretion.

(b) Proof of service—

- (1) When service is by registered, certified, overnight, or express mail, it is complete upon delivery of the document by the Postal Service or commercial service.

- (2) The return Postal Service receipt for a document that was registered or certified and mailed, the signed receipt for a document delivered by an overnight or express delivery service, or the Return of Service completed by the individual serving the subpoena by personal delivery shall be proof of service.

Subpart D—Intergovernmental Partnership

§ 101.400 What is the purpose of this subpart?

- (a) This subpart implements section 401 of the Intergovernmental Cooperation Act (31 U.S.C. 6506 *et seq.*) which promotes intergovernmental partnership and strengthens Federalism by relying on state processes and state, area-wide, regional, and local coordination for the review of proposed Federal financial assistance and direct Federal development.

- (b) While guiding SBA's management, this subpart does not create any right or benefit enforceable at law.

Small Business Administration

§ 101.404

§ 101.401 What programs and activities of SBA are subject to this subpart?

SBA publishes in the FEDERAL REGISTER a list of programs and activities subject to this subpart.

§ 101.402 What procedures apply to the selection of SBA programs and activities?

(a) A state may—

(1) Select any program or activity published in the FEDERAL REGISTER under § 101.401 for intergovernmental review (providing it consults with local elected officials before doing so) and then notify the Administrator of the programs and activities selected; and

(2) Notify the Administrator of changes in its selections at any time. For each change, the state submits to the Administrator an assurance that it consulted with local elected officials regarding the change.

(b) SBA may establish deadlines by which states must inform the Administrator of changes in their program selections.

(c) After receiving notice of a state's selections, the Administrator uses a state's process as soon as feasible depending on individual programs and activities.

(d) "State" means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 101.403 What are the notice and comment procedures?

(a) The Administrator provides notice to directly affected state, area-wide, regional, and local entities in a state of proposed SBA financial assistance or direct SBA development if—

(1) The state has not adopted a process under Executive Order 12372 (3 CFR, 1982 Comp., p. 197), as amended by Executive Order 12416 (3 CFR, 1983 Comp., p. 186); or

(2) The assistance or development involves a program or activity not selected for the state process.

(b) Notice may be made by publication in the FEDERAL REGISTER or other means as SBA deems appropriate.

(c) Except in unusual circumstances the Administrator gives state processes or directly affected state, area-wide, regional, and local officials and entities at least 60 days to comment on proposed SBA financial assistance or direct SBA development.

(d) In cases where SBA delegates the review, coordination, and communication authority under this subpart, this section also applies.

§ 101.404 How does the Administrator receive comments?

(a) The Administrator follows the procedures of § 101.405 if—

(1) A state office or official is designated to act as a single point of contact between a state process and all Federal agencies; and

(2) That office or official transmits a state process recommendation for a program selected under § 101.402(a).

(b)(1) The single point of contact is not obligated to transmit comments from state, area-wide, regional, or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, area-wide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, area-wide, regional, and local officials and entities may submit comments to SBA.

(d) If a program or activity is not selected for a state process, state, area-wide, regional, and local officials and entities may submit comments to SBA. In addition, if a state process recommendation for a non-selected program or activity is transmitted to SBA by the single point of contact, the Administrator follows the procedures of § 101.405.

(e) The Administrator considers comments which do not constitute a state process recommendation submitted under this subpart and for which the Administrator is not required to apply the procedures of § 101.405 when such comments are provided by a single point of contact directly to SBA by a commenting party.

§ 101.405

§ 101.405 How does the Administrator respond to comments?

(a) If a state process provides a recommendation to SBA through its single point of contact, the Administrator:

- (1) Accepts the recommendation; or
- (2) Reaches a mutually agreeable solution with the state process; or
- (3) Provides the single point of contact with a written explanation of the decision in a form the Administrator deems appropriate. The Administrator may also supplement the written explanation by telephone or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Administrator informs the single point of contact that—

- (1) SBA will not implement its decision for at least 10 days after the single point of contact receives the explanation; or
- (2) Because of unusual circumstances the waiting period of at least 10 days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing.

§ 101.406 What are the Administrator's responsibilities in interstate situations?

The Administrator is responsible for—

(a) Identifying proposed SBA financial assistance and direct SBA development that have an impact on interstate areas;

(b) Notifying appropriate officials and entities in states which have adopted a process and selected an SBA program or activity;

(c) Making efforts to identify and notify the affected state, area-wide, regional, and local officials and entities in states that have not adopted a process or selected an SBA program or activity;

(d) Using the procedures of § 101.405 if a recommendation of a designated area-wide agency is transmitted by a single point of contact in cases in which the review, coordination, and communication with SBA has been delegated; and

(e) Using the procedures of § 101.405 if a state process provides a state recommendation to SBA through a single point of contact.

§ 101.407 May the Administrator waive these regulations?

The Administrator may waive any provision of §§ 101.400 through and including 101.406 in an emergency.

PART 102—RECORD DISCLOSURE AND PRIVACY

Subpart A—Disclosure of Information

Sec.

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AUTHORITY: 5 U.S.C. 552 and 552a; 31 U.S.C. 1 *et seq.* and 67 *et seq.*; 44 U.S.C. 3501 *et seq.*; E.O. 12600, 3 CFR, 1987 Comp., p. 235.

SOURCE: 61 FR 2673, Jan. 29, 1996, unless otherwise noted.

Subpart A—Disclosure of Information

§ 102.1 What does this subpart do?

This subpart describes the procedures by which the SBA makes documents

available under the Freedom of Information Act ("FOIA") (5 U.S.C. 552).

§ 102.2 How can I get records from SBA?

(a) You can go to the SBA office at which the records are kept, and photocopy any final SBA decision, policy statement, or standard operating procedure.

(b) For copies of all other records, you must send a letter request to the SBA office at which the records are kept. The letter must describe specific records you want. If you don't know which SBA office keeps the records, you may send your letter to the nearest SBA District Office. You may also send your letter to the Chief, FOIA & PA Office, 409 Third Street SW., Suite 5900, Washington DC 20416. The office receiving your letter will forward it to the correct office.

§ 102.3 How long will it take for SBA to respond to my request for records?

(a) If you have met the fee requirements of § 102.8, SBA will respond within 10 working days after the correct office receives your request, unless you have requested an especially large number of records, the records are not located in the office handling the request, or SBA needs to consult with another government office.

(b) If you make your request on behalf of another person, SBA will respond within 10 working days after you present a document signed by that person authorizing you to request information on his or her behalf. If you make your request on behalf of another person without including such signed authorization, SBA will inform you of the authorization needed.

(c) If you send your request to the wrong office, that office will send it to the correct office within 10 working days and will send you an acknowledgment letter.

(d) If SBA determines that one of the circumstances described in paragraph (a) of this section apply, it will respond within 20 working days of the date upon which the correct office receives your request, and will notify you that the extra time is required.

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§ 102.4 How will SBA respond to my request?

Within the time limit described in § 102.3, SBA will either:

- (a) Give you all the records you requested;
- (b) Give you some or none of the records you requested, explain why SBA has decided not to comply fully with your request, citing specific exemptions where applicable, and explain how to appeal that decision; or
- (c) Tell you that you will not receive a response until you have either paid your fee or committed to the amount of fee you will pay, as applicable.

§ 102.5 If SBA grants my request, which records will be supplied?

SBA will give you copies of all records or portions of records requested which are in the processing office as of the close of the day upon which that office received your request.

§ 102.6 How will SBA respond to requests for business information?

(a) Business information is a trade secret, or commercial or financial information, contained in records provided to SBA by any person and which may be protected from disclosure under Exemption Four of FOIA (5 U.S.C. 552(b)(4)).

(b) The submitter is the business entity to which the business information pertains and which submitted the information to SBA, either directly or through an intermediary, such as a bank.

(c) SBA will disclose upon request business information that has previously been released to the general public.

(d) If you request business information submitted to SBA prior to March 1, 1996 which has not previously been released to the general public, SBA will notify the submitter of your request upon SBA's receipt of it if SBA intends to release that information. SBA will give the submitter 5 working days to identify information the disclosure of which would likely cause substantial competitive harm and why that harm would occur unless SBA intends to deny your request in full.

(e) If you request business information submitted to SBA after March 1,

1996 which has not previously been released to the general public, SBA will notify the submitter if it intends to release business information which either the submitter has previously claimed or which SBA believes to be confidential and the disclosure of which would cause substantial competitive harm. The submitter will have 5 working days to object to the disclosure, explaining why the harm would occur.

(f) Whenever a submitter objects to disclosure, SBA will consider the submitter's objections, but will not be bound by it. If SBA discloses information despite a submitter's objection, SBA will give the submitter the maximum notice possible before disclosure without violating the time constraints imposed by FOIA. In this notice, SBA will tell the submitter when and what it intends to disclose.

(g) SBA will promptly notify the submitter of any suit filed against SBA to compel disclosure.

§ 102.7 What are the procedures for submitters of business information to SBA after March 1, 1996?

Submitters may identify business information at the time of submission which would likely cause them substantial competitive harm if disclosed. The identification shall lapse after 10 years, unless renewed in writing.

§ 102.8 What fees will SBA charge?

(a) *Basic fees.* (1) *For manual record search.* SBA will charge \$18 per hour.

(2) *For computer record searches.* SBA will charge the actual costs.

(3) *For review and disclosure determinations.* SBA will charge \$18 per hour.

(4) *Duplication.* SBA will charge 10 cents per page for photocopy duplication, and the actual cost of reproduction for other methods.

(5) *Certifying records.* SBA will charge actual costs.

(6) *For requested special types of delivery other than first-class mail.* SBA may charge the actual cost.

(b) *If you are a representative of an educational institution, a non-commercial scientific institution, or a member of the news media.* SBA will charge you only for the cost of duplication after the first 100 pages.

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(1) *What is an educational institution?* A state-certified preschool, elementary or secondary school, an accredited college or university, an accredited institution of professional education, or any accredited or state-certified institute of vocational education which operates a program or programs of scholarly research.

(2) *What is a non-commercial scientific institution?* An organization which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(3) *What is a representative of an educational or non-commercial scientific institution?* A requester seeking records on behalf of that institution who is authorized by that institution to do so, and who is seeking those records for scholarly or scientific reasons, as long as there is no commercial purpose to the request for records.

(4) *What is a representative of the news media?* An individual who is actively gathering news for an entity that is organized and operated to disseminate information to the general public. To be considered "news media", this organization may provide information by subscription and may target its dissemination to a narrow section of the general public as long as any member of the general public may purchase information from it. If you are not employed by the news media, but have a reasonable expectation that you will sell the information you obtain to the news media, SBA may conclude that you are a representative of the news media. SBA will not consider you to be a representative of the news media if your request has a commercial purpose, beyond the commercial purpose of selling information to the general public.

(c) *Member of the general public.* If you are a member of the general public, SBA will not charge you for the first two hours of search time, the first hundred pages of photocopy duplication, or for review and disclosure determinations. The general public is anyone who is not a representative of an educational institution, a representative of the news media, or a commercial requester.

(d) *Commercial requester.* If you are a commercial requester you must pay all

the basic fees set forth in paragraph (a) of this section. A commercial requester is anyone seeking information for commercial, trade, or profit interests of the requester or someone he or she is trying to help.

(e) *How does SBA determine what category of requester I am?* The SBA office processing your request will determine the appropriate category. If you are not a commercial requester, you must show us what category of requester you are.

(f) *Tell us how much you are willing to pay.* To get the quickest possible response, you must tell SBA how much money you are willing to pay in fees when you make your request for records.

(g) If you don't tell us how much you are willing to pay and SBA estimates that the fee will exceed \$25.00, SBA will estimate the fee and will not process your request until you tell SBA that you are willing to pay the estimated amount, or until you narrow the request so that the fee is less than \$25.

(h) SBA will waive fees less than \$25.

(i) If the fee is more than \$250, or if you have a history of failing to pay FOIA fees in a timely manner, SBA will ask you to remit the estimated amount and any past due charges before sending you the records.

(j) *Who determines the fee?* The SBA office which processes your request.

(k) *When do you pay the fee?* SBA will bill you when it responds to your request. You must pay within thirty-one calendar days.

(l) *Failure to pay fees.* (1) If you do not pay by the thirty-first day after the billing date, SBA will charge interest at the maximum rate allowed under Title 31 of the United States Code, section 3717.

(2) If you do not pay the amount due within ninety calendar days of the due date, SBA may notify consumer credit reporting agencies of your delinquency.

(3) If you owe fees for previous FOIA responses, SBA will not respond to further requests unless you satisfy the amount due.

(m) *Unsuccessful searches.* If SBA's search for records is unsuccessful, it will still bill you for the search.

(n) *Multiple requests.* If you make multiple requests at or about the same

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time, SBA will aggregate your requests for records. In no case will SBA give you more than the first two hours of search time, or more than the first 100 pages of duplication without charge.

(c) *Reduction of fees in the public interest.* If SBA determines that disclosure of the information you seek is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and that you are not seeking the information in your own commercial interests, SBA may waive or reduce the fee.

§ 102.9 How may I appeal a denial of my request for information or a fee determination?

(a) You must write to the Chief, FOIA & PA Office at 409 Third Street SW., Suite 5900, Washington, DC 20416.

(b) The Chief must receive your written appeal within 45 calendar days of the date of the SBA determination from which you are appealing.

(c)(1) If you are appealing a denial of your request for information, the appeal must contain the following information:

- (i) What records were denied.
- (ii) The name and title of the individual who denied the request and the address of his or her office.
- (iii) Any other information you deem appropriate.

(2) If you are appealing a fee determination, the appeal must contain the following information:

- (i) The address of the office which made the fee determination from which you are appealing.
- (ii) The fee that office charged.
- (iii) The fee, if any, you believe should have been charged.
- (iv) The reasons you believe that your fee should be lower than the fee which the Agency charged.
- (v) Any other information you deem appropriate.

(d) The Chief will decide your appeal, unless the Chief originally made the determination you are appealing. In that case, SBA's Assistant Administrator for Hearings and Appeals will decide your appeal.

(e) SBA will decide your appeal within 20 working days from the date of its receipt. SBA may have an additional 10

working days if unusual circumstances require.

(f)(1) If you are appealing a decision to deny your request for records, SBA will either:

- (i) Give you the records you requested; or
- (ii) Decline to give you the records you requested, tell you why SBA has concluded that the records were exempt from disclosure under FOIA, and tell you how to obtain judicial review of SBA's decision.

(2) If you are appealing a fee determination, SBA will either charge the fee you request or charge another fee and explain why SBA has concluded that the fee it has decided to charge is appropriate.

§ 102.10 How can I get the Public Index of SBA materials?

(a) The Public Index is a document which provides identifying information about official documents which SBA has issued.

(b) SBA has administratively determined, as permitted by FOIA, that periodic publication and distribution is unnecessary and impracticable.

(c) The Public Index is set forth in Appendix 3 of SBA Standard Operating Procedure 40 03. You can obtain the Public Index from any SBA office.

§ 102.11 What happens if I ask SBA for a record that another Federal agency generated?

Such a request is a request directed to the wrong office, as that term is used in § 102.3(c). SBA will forward your request to the generating agency.

§ 102.12 What happens if I subpoena records or testimony of employees in connection with a civil lawsuit, criminal proceeding or administrative proceeding to which SBA is not a party?

(a) The person to whom the subpoena is directed must consult with SBA counsel in the relevant SBA office, who will seek approval for compliance from the Associate General Counsel for Litigation. Except where the subpoena requires the testimony of an employee of the Inspector General's office, or records within the possession of the Inspector General, the Associate General

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Counsel may delegate the authorization for appropriate production of documents or testimony to local SBA counsel.

(b) If SBA counsel approves compliance with the subpoena, SBA will comply.

(c) If SBA counsel disapproves compliance with the subpoena, SBA will not comply, and will base such non-compliance on an appropriate legal basis such as privilege or a statute.

(d) SBA counsel must provide a copy of any subpoena relating to a criminal matter to SBA's Inspector General prior to its return date.

Subpart B—The Privacy Act

§ 102.20 What privacy rights does this subpart regulate?

This subpart establishes SBA's policy and procedures safeguarding an individual against an invasion of personal privacy.

(a) Except as otherwise provided by law or regulation, SBA will permit you to do the following:

(1) Determine what records pertaining to you are collected, maintained, used, or disseminated by SBA;

(2) Object when records pertaining to you are obtained by SBA for a particular purpose and are proposed to be used or made available for another purpose without your consent; and

(3) Gain access to information pertaining to you in records, have a copy made of all or any portion of those records, and correct or amend such records as appropriate.

(b) SBA will collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information.

(c) SBA will permit exemptions from the requirements of 5 U.S.C. 552a (Privacy Act of 1974) ("PA") only where an important public policy need for such exemption has been determined pursuant to or under specific statutory authority.

§ 102.21 How will SBA maintain records?

SBA records will:

(a) Contain only such information about an individual as is relevant and necessary to accomplish a purpose required of SBA by statute, regulation, or by Executive Order of the President.

(b) Be comprised, to the maximum practical extent, of an individual's own statements when the information may result in an adverse determination about an individual's rights, benefits, or privileges under a Federal program.

§ 102.22 When will SBA disclose records?

SBA will not disclose to anyone any record which is contained in a system of records, except that it will disclose a record:

(a) To the person about whom the record is maintained, or to that person's agent, within the limits discussed in this subpart;

(b) To those SBA employees who have a need for the record to perform their duties;

(c) When required under 5 U.S.C. 552 (FOIA);

(d) For a routine use of the record compatible with the purpose for which it was collected;

(e) To the Bureau of the Census for purposes of planning or carrying out a census, survey, or related activity pursuant to Title 13, United States Code;

(f) To a recipient who has provided the Agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, where the record is transferred in a form that is not individually identifiable;

(g) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the U.S. Government, or for evaluation by the Administrator of General Services or his or her designee to determine whether the record has such value;

(h) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if:

(1) The activity is authorized by law; and

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(2) The head of the agency or instrumentality has made a written request to the PA Officer specifying the particular portion desired and the law enforcement activity for which the record is sought;

(i) To a person showing compelling circumstances affecting the health or safety of an individual. Upon disclosure, SBA will notify such individual at his or her last known address;

(j) To either House of Congress, or, to the extent of matters within its jurisdiction, any committee or subcommittee thereof, or any joint committee of Congress or subcommittee of any such joint committee;

(k) To the Comptroller General, or any of his or her authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(l) Pursuant to the order of a court of competent jurisdiction; or

(m) To a consumer reporting agency in accordance with 31 U.S.C. 3711(f).

§ 102.23 Are there special rules about personnel and equal employment opportunity files?

(a) The provisions of parts 293 and 297 of title 5 of the Code of Federal Regulations govern all SBA files which the Office of Personnel Management determines are personnel files.

(b) The provisions of part 1611 of title 29 of the Code of Federal Regulations govern all Equal Employment Opportunity complaint files.

§ 102.24 What is a record?

A record is information which SBA maintains on an individual and which includes either his name or an identifying symbol (such as a fingerprint, a social security number ("SSN"), or a photograph).

§ 102.25 What is a system of records?

A system of records is one or more records which SBA routinely keeps for official purposes, and from which SBA can retrieve records by using a name or personal identifier.

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§ 102.26 What does this subpart mean by "person to whom a record pertains" or "you"?

When this subpart refers to the "person to whom a record pertains" or uses the pronoun "you", it refers to a United States citizen or a lawfully admitted alien. It does not refer to a corporation, partnership, or sole proprietorship.

§ 102.27 What records are partially exempt from the provisions of the Privacy Act?

(a) The following systems of records are exempt from certain provisions of the PA: Audit Reports (system of records #SBA 015), Litigation and Claims Files (#SBA 070), Personnel Security Files (#SBA 100), Security and Investigations Files (#SBA 120), Office of Inspector General Referrals (#SBA 125), Investigations Division Management Information System (#SBA 130), and Standards of Conduct Files (#SBA 140).

(b) The provisions of the PA from which these systems of records are exempt are subsections (c)(3) (Accounting of Certain Disclosures), (d) (Access to Records), (e)(1), 4G, H, and I (Agency Requirements), and (f) (Agency Rules).

(c) The systems of records described in paragraph (a) of this section are exempt from the provisions of the Privacy Act described in paragraph (b) of this section in order to:

(1) Prevent the subject of investigations from frustrating the investigatory process;

(2) Protect investigatory material compiled for law enforcement purposes;

(3) Fulfill commitments made to protect the confidentiality of sources and to maintain access to necessary sources of information; or

(4) Prevent interference with law enforcement proceedings.

(d) In addition to the foregoing exemptions in paragraphs (a) through (c) of this section, the systems of records described in paragraph (a) of this section numbered SBA 015, 100, 120, 125 and 130 are fully exempt from the Privacy Act to the extent that they contain:

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(1) Information compiled to identify individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, confinement, release, and parole and probation status;

(2) Information, including reports of informants and investigators, associated with an identifiable individual compiled to investigate criminal activity; or

(3) Reports compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision associated with an identifiable individual.

(e) The systems of records described in paragraph (d) of this section are fully exempt from the PA to the extent described in that paragraph because they are records maintained by the Investigations Division of the Inspector General, which is a component of SBA which performs as its principal function activities pertaining to the enforcement of criminal laws within the meaning of 5 U.S.C. 552a(j)(2). They are exempt in order to:

(1) Prevent the subjects of Office of Inspector General (OIG) investigations from using the PA to frustrate the investigative process;

(2) Protect the identity of Federal employees who furnish a complaint or information to the OIG, consistent with section 7(b) of the Inspector General Act of 1978, 5 U.S.C. App. I;

(3) Protect the confidentiality of other sources of information;

(4) Avoid endangering confidential sources and law enforcement personnel;

(5) Prevent interference with law enforcement proceedings;

(6) Assure access to sources of confidential information, including that contained in Federal, State, and local criminal law enforcement information systems;

(7) Prevent the disclosure of investigative techniques; or

(8) Prevent the disclosure of classified information.

§ 102.28 What about information compiled for a civil action?

No individual shall have access to any information compiled by SBA in reasonable anticipation of a civil ac-

tion or proceeding. In the event of a question as to disclosure, the Systems Manager for the system of records involved will rely on the opinion of the General Counsel or designee, and will also consult with the PA Officer.

§ 102.29 Who administers SBA's responsibilities under the Privacy Act?

The PA Officer has overall responsibility for administering the PA for SBA. A Systems Manager is responsible for administering the PA as to systems of records within an SBA Office.

§ 102.30 How can I write to the Privacy Act Officer?

You can write to the PA Officer at 409 Third Street SW., Suite 5900, Washington, DC 20416.

§ 102.31 Who appoints Systems Managers?

The senior official in each field office and each Headquarters program area designates himself or herself or appoints another as the Systems Manager for that office.

§ 102.32 What do Systems Managers do?

Systems Managers have the following responsibilities, among others, for the offices for which they are appointed:

(a) Acting as the initial contact person for individuals seeking access to or amendment of their records.

(b) Responding to requests for information.

(c) Discussing the availability of records with individuals.

(d) Amending records in cases where amended information is not controversial and does not involve policy decisionmaking.

(e) Informing individuals of any reproduction fees to be charged.

(f) Assuring that their systems of records contain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained, or unless pertinent to and within the scope of an authorized law enforcement activity.

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§ 102.33 How can I write to a Systems Manager?

You can write to a Systems Manager by writing to the SBA Office which maintains the record you are seeking. If you do not know which office that is, or you do not know the address of that office, you can write to the PA Officer at 409 3rd Street SW., Suite 5900, Washington, DC 20416, who will forward your request to the proper Systems Manager.

§ 102.34 How can I see records kept on me?

(a) You may look at any information pertaining to yourself contained in any SBA system of records unless some law or regulation prohibits it.

(b) In order to see this information, you must ask for it in writing, identifying what records you want. The writing should be addressed to the Systems Manager overseeing the system of records containing the record you wish to see.

(c) The Systems Manager (or, when appropriate, the PA Officer) may ask for more specific information about the system of records in which the document you are seeking is kept, and may ask you for identification. The Systems Manager may ask you for your social security number but you are not obliged to present it and your request will not be denied simply because you do not provide it. The Systems Manager may, however, deny your request if he or she cannot determine that you are the person to whom the information pertains.

§ 102.35 How long will it take SBA to respond to my request?

The Systems Manager will respond within 10 working days.

§ 102.36 How will SBA respond to my request?

The Systems Manager will inform you that:

(a) Your request is denied, in which case he or she will set forth the reasons for denial and your rights to appeal; or

(b) Your request is granted and you may view your record, in which case he or she will set forth the time and date for you to review your record in the presence of an SBA employee; or

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(c) Your request is granted and, unless you object, SBA will mail you a copy of your record. SBA will mail you your record only if it determines that there are no other reasonable means for you to obtain access to your record.

§ 102.37 How may I appeal a decision to deny me access to my records?

Your appeal should be in writing and should set forth any information you think would show that you should have access to your records.

§ 102.38 To whom should my appeal be addressed?

(a) *Denial of a personnel file.* Address an appeal of a denial of a request for a personnel file to the Office of Personnel Management, 1900 E Street NW., Washington, DC 20006.

(b) *Denial of an Equal Employment Opportunity Complaint File.* Address an appeal of a denial of a request for an Equal Employment Opportunity Complaint File to the Equal Employment Opportunity Commission, 1801 L Street NW., Washington, DC 20036.

(c) *All other appeals.* Appeal the denial of any other record to the PA Officer. See § 102.30.

§ 102.39 By when must I appeal to the Privacy Act Officer?

Your appeal must reach the PA Officer on or before 30 calendar days after the date the denial was issued. If your appeal is based on the failure of the Systems Manager to answer your request, your appeal must reach the PA Officer on or before 90 calendar days after the date by which the Systems Manager should have responded under § 102.35.

§ 102.40 When will SBA respond to my appeal?

The PA Officer will respond to you within 30 working days of the date when your appeal was received.

§ 102.41 How will SBA respond to my appeal?

The PA Officer will inform you that:

(a) Your request is denied, in which case the reasons for denial will be set forth along with your rights to judicial review of SBA's decision; or

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(b) Your request is granted and you may view your record, in which case the time and date for you to review your records in the presence of an SBA employee will be set forth; or

(c) Your request is granted and, unless you object, SBA will mail you a copy of your record. SBA will mail you your record only if it determines that there are no other reasonable means for you to obtain access to your record.

§ 102.42 How can I get SBA to amend a record kept on me?

You can petition to have records kept on you amended by writing to the Systems Manager who oversees the system of records in which the record you wish amended is kept. If you are unable to determine who that Systems Manager is, you may send your petition to the PA Officer, who will forward it to the right Systems Manager. See § 102.30.

§ 102.43 What should my petition say?

Your petition should include the following:

- (a) In what system of records the record you want amended is kept.
- (b) What record you want amended.
- (c) What specific information in that record you want amended.
- (d) Why you want the record amended.
- (e) Any information you have, including copies of evidence, which you think will persuade the Systems Manager to amend the record.
- (f) What the record should say.

§ 102.44 For what reasons will SBA amend my record?

SBA seeks to maintain only accurate, complete, and up-to-date records which are relevant to accomplish some purpose required by law, regulation, or Executive Order of the President. There are four grounds for amending a record. They are:

- (a) The record is not accurate.
- (b) The record is not relevant to any legitimate SBA concern.
- (c) The record is out-of-date. For example, there may have been events since the date of the record which have affected some of the information contained in the record.

(d) The record is incomplete. There may be additional information relevant to the material contained in the record.

§ 102.45 Will SBA ask me for more information after I make my request?

Perhaps, in which case the procedures of § 102.34(c) shall apply.

§ 102.46 When will SBA respond to my request?

The Systems Manager will acknowledge receipt of your request within 10 working days and issue a written response within 30 working days.

§ 102.47 How will SBA respond to my request?

The Systems Manager will:

- (a) Make the amendment you request, and send all individuals who had previously received a copy of that record a copy of the amended record; or
- (b) Amend the record, in a different manner, sending all individuals who had previously received a copy of that record a copy of the amended record and, in addition, telling you why your request was not granted in full and what appeal rights you have; or
- (c) Decline to amend the record, explaining why your request was not granted and telling you of your appeal rights.

§ 102.48 How do I appeal a refusal to amend a record kept on me?

Your appeal should be in writing and include the following:

- (a) All of the information contained in your original request to amend the record;
- (b) Any response of the Systems Manager, including any reasons for denying your request; and
- (c) Any information you wish to submit in response to the Systems Manager's findings.

§ 102.49 To whom should I address my appeal?

(a) *Personnel file.* Address your appeal to the Office of Personnel Management, 1900 E Street NW., Washington, DC 20006.

(b) *Equal Employment Opportunity Complaint File.* Address your appeal to the Equal Employment Opportunity

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Commission, 1801 L Street NW., Washington, DC 20036.

(c) *All other appeals.* Address your appeal to the PA Officer. See § 102.30.

§ 102.50 By when must I submit my appeal?

Your appeal must be received by the PA Officer within 30 calendar days of the date the Systems Manager declined to amend your records, or within 90 calendar days of the date the Systems Manager should have responded under § 102.46 if the Systems Manager did not so respond.

§ 102.51 By what standards will the Privacy Act Officer review my appeal?

The PA Officer will decide your appeal using the criteria of accuracy, relevance, timeliness, and completeness described in § 102.44. The PA Officer will review all relevant information and may seek the views of other SBA personnel. The PA Officer may review information not available to or not used by the Systems Manager.

§ 102.52 When will SBA respond to my appeal?

The PA Officer will respond to your appeal within 30 working days of its receipt, unless the Administrator determines that unusual circumstances exist, in which case the PA Officer will notify you of the presence of these unusual circumstances within 30 working days of the date upon which he or she received your appeal, and will respond to your appeal within 60 working days of the date of receipt.

§ 102.53 How will SBA respond to my appeal?

The PA Officer will:

- (a) Make the amendment you request, sending all individuals who had previously received a copy of that record a copy of the amended record; or
- (b) Amend the record in a different manner; or decline to amend it at all:
 - (1) Sending all individuals who had previously received a copy of that record a copy of the amended record;
 - (2) Telling you why your request was not granted in full and that you can seek judicial review; and

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(3) Marking the areas of dispute, including your statement of disagreement in the file, and, if appropriate, a concise statement of why SBA refused to amend the record as you requested, sending this material to all individuals who had previously received a copy of that record.

§ 102.54 How can I obtain judicial review of an SBA Privacy Act decision?

You may bring a civil action against SBA in a United States district court if the SBA:

- (a) Makes a final determination not to provide you with access to or to amend your record in accordance with your request;
- (b) Fails to maintain your records with such accuracy, relevance, timeliness and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, opportunities of, or benefits to you that may be made on the basis of such records, and consequently a determination is made which harms you; or
- (c) Fails to comply with any other provisions of the PA (5 U.S.C. 552a) or the implementing regulations in this subpart, in such a way as to cause harm to you.

§ 102.55 What must SBA tell the individuals from whom it collects information?

When SBA collects information from an individual, it must, either on the form which collects the information or on a separate form which the individual may keep, state:

- (a) Whether disclosure of the information is voluntary or mandatory;
- (b) By what authority SBA is collecting the information;
- (c) For what principal purpose or purposes SBA is collecting the information;
- (d) What routine uses might be made of that information; and
- (e) What will happen if the information isn't supplied.

§ 102.56 Will SBA release my name or address?

No, unless compelled to by law.

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§ 102.57 Do I have to give SBA my SSN?

(a) No. You need not give SBA your SSN, even if SBA asks for it.

(b) If SBA asks you for your SSN, it must tell you under what authority it seeks your SSN, and for what purpose.

(c) SBA cannot withhold a benefit solely because you refuse to tell it your SSN.

§ 102.58 When will SBA show personnel records to a representative?

(a) If you go to where the records are kept, SBA will permit one person of your choosing to inspect the records with you.

(b) If you want your representative to inspect the records without you, you must give SBA a written authorization.

(c) SBA will mail a copy of the record to your representative if you direct SBA to do so in writing.

(d) You may inspect the records of a minor if you present evidence that you are the custodial parent (including joint custodial parent) or legal guardian of that minor. An affidavit or declaration, signed by you under penalty of perjury, is normally sufficient evidence unless SBA has information to the contrary.

(e) You may inspect the records of an adult incompetent if you present evidence that you are the legal guardian of that person. A guardianship order is sufficient evidence of your guardianship. Other evidence may be considered.

§ 102.59 What fees will SBA charge me for my records?

SBA will charge you only for photocopying at the rate of 10 cents per page. SBA will not charge you for finding or reviewing your records. Fees less than \$25 will be waived.

§ 102.60 May I be informed of disclosures made of my records?

SBA will tell you what disclosures it made of your records if you ask, except that SBA will not tell you about disclosures it made to another federal agency or government entity for law enforcement purposes.

§ 102.61 Are there Matching Program procedures?

(a) SBA will comply with the Computer Matching and Privacy Protection Act of 1988 (5 U.S.C. 552a, 552a notes). This Act establishes procedures federal agencies must use if they want to match their computer lists.

(b) If SBA adopts any procedures to supplement its compliance with the Computer Matching and Privacy Protection Act of 1988 which are not mandated in that Act, SBA will publish those procedures in Standard Operating Procedure (SOP) 40 04. You can get a copy of SOP 40 04 at any SBA Office.

(c) If SBA enters into an agreement with any federal agency, contractor of any federal agency, state or local government, or agency of any state or local government to disclose records for purposes of a computer matching program, SBA will make a copy of that agreement available to the general public. You can get a copy of any such agreement by writing to the Privacy Act Officer.

PART 103—STANDARDS FOR CONDUCTING BUSINESS WITH SBA

103.1 Key definitions.

103.2 Who may conduct business with SBA?

103.3 May SBA suspend or revoke an Agent's privilege?

103.4 What is "good cause" for suspension or revocation?

103.5 How does SBA regulate an Agent's fees and provision of service?

AUTHORITY: Secs. 5, 13, 72 Stat. 385, 394 (15 U.S.C. 634, 642).

SOURCE: 61 FR 2681, Jan. 29, 1996, unless otherwise noted.

§ 103.1 Key definitions.

(a) *Agent* means an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other person representing an applicant or participant by conducting business with SBA.

(b) The term *conduct business with SBA* means:

(1) Preparing or submitting on behalf of an applicant an application for financial assistance of any kind, assistance from the Investment Division of

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SBA, or assistance in procurement and technical matters;

(2) Preparing or processing on behalf of a lender or a participant in any of SBA's programs an application for federal financial assistance;

(3) Participating with or communicating in any way with officers or employees of SBA on an applicant's, participant's, or lender's behalf;

(4) Acting as a lender service provider; and

(5) Such other activity as SBA reasonably shall determine.

(c) *Applicant* means any person, firm, concern, corporation, partnership, cooperative or other business enterprise applying for any type of assistance from SBA.

(d) *Lender Service Provider* means an Agent who carries out lender functions in originating, disbursing, servicing, or liquidating a specific SBA business loan or loan portfolio for compensation from the lender. SBA determines whether or not one is a "Lender Service Provider" on a loan-by-loan basis.

(e) *Packager* means an Agent who is employed and compensated by an Applicant or lender to prepare the Applicant's application for financial assistance from SBA. SBA determines whether or not one is a "Packager" on a loan-by-loan basis.

(f) *Referral Agent* means a person or entity who identifies and refers an Applicant to a lender or a lender to an Applicant. The Referral Agent may be employed and compensated by either an Applicant or a lender.

(g) *Participant* means a person or entity that is participating in any of the financial, investment, or business development programs authorized by the Small Business Act or Small Business Investment Act of 1958.

§ 103.2 Who may conduct business with SBA?

(a) If you are an Applicant, a Participant, a partner of an Applicant or Participant partnership, or serve as an officer of an Applicant, Participant corporation, or limited liability company, you may conduct business with SBA without a representative.

(b) If you are an Agent, you may conduct business with SBA on behalf of an Applicant, Participant or lender, un-

less representation is otherwise prohibited by law or the regulations in this part or any other part in this chapter. For example, persons debarred under the SBA or Government-wide debarment regulations may not conduct business with SBA. SBA may request that any Agent supply written evidence of his or her authority to act on behalf of an Applicant, Participant, or lender as a condition of revealing any information about the Applicant's, Participant's, or lender's current or prior dealings with SBA.

§ 103.3 May SBA suspend or revoke an Agent's privilege?

The Administrator of SBA or designee may, for good cause, suspend or revoke the privilege of any Agent to conduct business with SBA. Part 134 of this chapter states the procedures for appealing the decision to suspend or revoke the privilege. The suspension or revocation remains in effect during the pendency of any administrative proceedings under part 134 of this chapter.

§ 103.4 What is "good cause" for suspension or revocation?

Any unlawful or unethical activity is good cause for suspension or revocation of the privilege to conduct business. This includes:

(a) Attempting to influence any employee of SBA or a lender, by gifts, bribes or other unlawful or unethical activity, with respect to any matter involving SBA assistance.

(b) Soliciting for the provision of services to an Applicant by another entity when there is an undisclosed business relationship between the two parties.

(c) Violating ethical guidelines which govern the profession or business of the Agent or which are published at any time by SBA.

(d) Implying or stating that the work to be performed for an Applicant will include use of political or other special influence with SBA. Examples include indicating that the entity is affiliated with or paid, endorsed or employed by SBA, advertising using the words *Small Business Administration* or *SBA* in a manner that implies SBA's endorsement or sponsorship, use of SBA's seal or symbol, and giving a "guaranty" to

an Applicant that the application will be approved.

(e) Charging or proposing to charge any fee that does not bear a necessary and reasonable relationship to the services actually rendered or expenses actually incurred in connection with a matter before SBA or which is materially inconsistent with the provisions of an applicable compensation agreement or Lender Service Provider agreement. A fee based solely on a percentage of a loan or guarantee amount can be reasonable, depending on the circumstances of a case and the services actually rendered.

(f) Engaging in any conduct indicating a lack of business integrity or business honesty, including debarment, criminal conviction, or civil judgment within the last seven years for fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, conspiracy, receiving stolen property, false claims, or obstruction of justice.

(g) Acting as both a Lender Service Provider or Referral Agent and a Packager for an Applicant on the same SBA business loan and receiving compensation for such activity from both the Applicant and lender. A limited exception to this "two master" prohibition exists when an Agent acts as a Packager and is compensated by the Applicant for packaging services; also acts as a Referral Agent and is compensated by the lender for those activities; discloses the referral activities to the Applicant; and discloses the packaging activities to the lender.

(h) Violating materially the terms of any compensation agreement or Lender Service Provider agreement provided for in § 103.5.

(i) Violating or assisting in the violation of any SBA regulations, policies, or procedures of which the Applicant has been made aware.

§ 103.5 How does SBA regulate an Agent's fees and provision of service?

(a) Any Applicant, Agent, or Packager must execute and provide to SBA a compensation agreement, and any Lender Service Provider must execute and provide to SBA a Lender Service Provider agreement. Each agreement

governs the compensation charged for services rendered or to be rendered to the Applicant or lender in any matter involving SBA assistance. SBA provides the form of compensation agreement and a suggested form of Lender Service Provider agreement to be used by Agents.

(b) Compensation agreements must provide that in cases where SBA deems the compensation unreasonable, the Agent or Packager must: reduce the charge to an amount SBA deems reasonable, refund any sum in excess of the amount SBA deems reasonable to the Applicant, and refrain from charging or collecting, directly or indirectly, from the Applicant an amount in excess of the amount SBA deems reasonable.

(c) Each Lender Service Provider must enter into a written agreement with each lender for whom it acts in that capacity. SBA will review all such agreements. Such agreements need not contain each and every provision found in the SBA's suggested form of agreement. However, each agreement must indicate that both parties agree not to engage in any sharing of secondary market premiums, that the services to be provided are accurately described, and that the agreement is otherwise consistent with SBA requirements. Subject to the prohibition on splitting premiums, lenders have reasonable discretion in setting compensation for Lender Service Providers. However, such compensation may not be directly charged to an Applicant or borrower.

PART 105—STANDARDS OF CONDUCT AND EMPLOYEE RESTRICTIONS AND RESPONSIBILITIES

STANDARDS OF CONDUCT

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105.101 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

RESTRICTIONS AND RESPONSIBILITIES RELATED TO SBA EMPLOYEES AND FORMER EMPLOYEES

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- 105.205 Duty to report irregularities.
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- 105.207 Politically motivated activities with respect to the Minority Small Business Program.
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RESTRICTIONS ON SBA ASSISTANCE TO OTHER INDIVIDUALS

- 105.301 Assistance to officers or employees of other Government organizations.
- 105.302 Assistance to employees or members of quasi-Government organizations.

ADMINISTRATIVE PROVISIONS

- 105.401 Standards of Conduct Committee.
- 105.402 Standards of Conduct Counselors.
- 105.403 Designated Agency Ethics Officials.

AUTHORITY: 5 U.S.C. 7301; 15 U.S.C. 634, 637(a)(18) and (a)(19), 642, and 645(a).

SOURCE: 61 FR 2399, Jan. 26, 1996, unless otherwise noted.

STANDARDS OF CONDUCT

§ 105.101 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

In addition to this part, Small Business Administration (SBA) employees should refer to the Uniform Standards of Ethical Conduct for Executive Branch employees at 5 CFR part 2635, the SBA Supplemental Standards of Ethical Conduct at 5 CFR chapter XLIV, and the Uniform Financial Disclosure regulation for Executive Branch employees at 5 CFR part 2634.

RESTRICTIONS AND RESPONSIBILITIES RELATED TO SBA EMPLOYEES AND FORMER EMPLOYEES

§ 105.201 Definitions.

(a) *Employee* means an officer or employee of the SBA regardless of grade, status or place of employment, including employees on leave with pay or on leave without pay other than those on extended military leave. Unless stated otherwise, Employee shall include

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those within the category of Special Government Employee.

(b) *Special Government Employee* means an officer or employee of SBA, who is retained, appointed or employed to perform temporary duties on a full-time or intermittent basis, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days.

(c) *Person* means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

(d) *Household member* means spouse and minor children of an employee, all blood relations of the employee and any spouse who resides in the same place of abode with the employee.

(e) *SBA Assistance* means financial, contractual, grant, managerial or other aid, including size determinations, section 8(a) participation, licensing, certification, and other eligibility determinations made by SBA. The term also includes an express decision to compromise or defer possible litigation or other adverse action.

§ 105.202 Employment of former employee by person previously the recipient of SBA Assistance.

(a) No former employee, who occupied a position involving discretion over, or who exercised discretion with respect to, the granting or administration of SBA Assistance may occupy a position as employee, partner, agent, attorney or other representative of a concern which has received this SBA Assistance for a period of two years following the date of granting or administering such SBA Assistance if—

(1) The date of granting or administering such SBA Assistance was within the period of the employee's term of employment; or

(2) The date of granting or administering such SBA Assistance was within one year following the termination of such employment.

(b) Failure of a recipient of SBA Assistance to comply with these provisions may result, in the discretion of SBA, in the requirement for immediate repayment of SBA financial Assistance, the immediate termination of

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other SBA Assistance involved or other appropriate action.

§ 105.203 SBA Assistance to person employing former SBA employee.

(a) SBA will not provide SBA Assistance to any person who has, as an employee, owner, partner, attorney, agent, owner of stock, officer, director, creditor or debtor, any individual who, within one year prior to the request for such SBA Assistance was an SBA employee, without the prior approval of the SBA Standards of Conduct Counselor. The Standards of Conduct Counselor will refer matters of a controversial nature to the Standards of Conduct Committee for final decision; otherwise, his or her decision is final.

(b) In reviewing requests for approval, the Standards of Conduct Counselor will consider:

(1) The relationship of the former employee with the applicant concern;

(2) The nature of the SBA Assistance requested;

(3) The position held by the former employee with SBA and its relationship to the SBA Assistance requested; and

(4) Whether an apparent conflict of interest might exist if the SBA Assistance were granted.

§ 105.204 Assistance to SBA employees or members of their household.

Without the prior written approval of the Standards of Conduct Committee, no SBA Assistance, other than Disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, shall be furnished to a person when the sole proprietor, partner, officer, director or significant stockholder of the person is an SBA employee or a household member.

§ 105.205 Duty to report irregularities.

Every employee shall immediately report to the SBA Inspector General any acts of malfeasance or misfeasance or other irregularities, either actual or suspected, arising in connection with the performance by SBA of any of its official functions.

§ 105.206 Applicable rules and directions.

Every employee shall follow all agency rules, regulations, operating procedures, instructions and other proper directions in the performance of his official functions.

§ 105.207 Politically motivated activities with respect to the Minority Small Business Program.

(a) Any employee who has authority to take, direct others to take, recommend, or approve any action with respect to any program or activity conducted pursuant to section 8(a) or section 7(j) of the Small Business Act, shall not, with respect to any such action, exercise or threaten to exercise such authority on the basis of the political activity or affiliation of any party. Employees shall expeditiously report to the SBA Inspector General any such action for which such employee's participation has been solicited or directed.

(b) Any employee who willfully and knowingly violates this section shall be subject to disciplinary action, which may consist of separation from service, reduction in grade, suspension, or reprimand.

(c) This section shall not apply to any action taken as a penalty or other enforcement of a violation of any law, rule, or regulation prohibiting or restricting political activity.

(d) The prohibitions in and remedial measures provided for under this section with regard to such prohibitions, shall be in addition to, and not in lieu of, any other prohibitions, measures or liabilities that may arise under any other provision of law.

§ 105.208 Penalties.

Any employee guilty of violating any of the provisions in this part may be disciplined, including removal or suspension from SBA employment.

RESTRICTIONS ON SBA ASSISTANCE TO OTHER INDIVIDUALS

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§ 105.301 Assistance to officers or employees of other Government organizations.

(a) SBA must receive a written statement of no objection by the pertinent Department or military service before it gives any SBA Assistance, other than Disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, to a person when its sole proprietor, partner, officer, director or stockholder with a 10 percent or more interest, or a household member, is an employee of another Government Department or Agency having a grade of at least GS-13 or its equivalent.

(b) The Standards of Conduct Committee must approve an SBA contract with an entity if a sole proprietor, general partner, officer, director, or stockholder with a 10 or more percent interest (or a household member of such individuals) is an employee of a Government Department or Agency. See also 48 CFR part 35, subpart 3.6.

(c) The Standards of Conduct Committee must approve SBA Assistance, other than disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, to a person if its sole proprietor, general partner, officer, director or stockholder with a 10 percent or more interest (or a household member of such individual) is a member of Congress or an appointed official or employee of the legislative or judicial branch of the Government.

§ 105.302 Assistance to employees or members of quasi-Government organizations.

(a) The Standards of Conduct Committee must approve SBA Assistance, other than Disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, to a person if its sole proprietor, general partner, officer, director or stockholder with a 10 percent or more interest (or a household member) is a member or employee of a Small Business Advisory Council or is a SCORE volunteer.

(b) In reviewing requests for approval, factors the Standards of Conduct Committee may consider include whether the granting of the SBA Assistance might result in or create the appearance of giving preferential treat-

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ment, the loss of complete independence or impartiality, or adversely affect the confidence of the public in the integrity of the Government.

ADMINISTRATIVE PROVISIONS

§ 105.401 Standards of Conduct Committee.

(a) The Standards of Conduct Committee will:

(1) Advise and give direction to SBA management officials concerning the administration of this part and any other rules, regulations or directives dealing with conflicts of interest and ethical standards of SBA employees; and

(2) Make decisions on specific requests when its approval is required.

(b) The Standards of Conduct Committee will consist of:

(1) The General Counsel or, in his or her absence, the Deputy General Counsel or, in his or her absence, the Acting General Counsel who shall act as Chairman of the Committee;

(2) The Associate Deputy Administrator for Management and Administration, or in his or her absence, the Assistant Administrator for Administration; and

(3) The Director of Human Resources, or in his or her absence, the Deputy Director of Human Resources.

§ 105.402 Standards of Conduct Counselors.

(a) The SBA Standards of Conduct Counselor is the Designated Agency Ethics Official, as appointed by the Administrator. Assistant Standards of Conduct Counselors may be designated by the Standards of Conduct Counselor.

(b) The Standards of Conduct Counselors and Assistants:

(1) Provide general advice, assistance and guidance to employees concerning this part and the regulations referred to in § 105.101;

(2) Monitor the Standards of Conduct Program within their assigned areas and provide required reports thereon;

(3) Review Confidential Financial Disclosure Reports as required under 5 CFR part 2634, subpart I, and provide an annual report on compliance with

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filing requirements to the SBA Standards of Conduct Counselor as of February 1 of each year; and

(4) Provide Outside Employment decisions pursuant to 5 CFR 5401.104.

(c) Each employee will be periodically informed of the name, address and telephone number of the Assistant Standards of Conduct Counselor to contact for advice and assistance.

(d) Employee requests for advice or rulings should be directed to the appropriate Standards of Conduct Counselor for appropriate action.

[61 FR 2399, Jan. 26, 1996, as amended at 62 FR 48477, Sept. 16, 1997]

§ 105.403 Designated Agency Ethics Officials.

The Designated Agency Ethics Official and Alternates administer the program for Financial Disclosure Statements under 5 CFR 2634.201, receive and evaluate these statements, and provide advice and counsel regarding matters relating to the Ethics in Government Act of 1978 and its implementing regulations. The duties and responsibilities of the Designated Agency Ethics Official and Alternates are set forth in more detail in 5 CFR 2638.203, which is promulgated and amended by the Office of Government Ethics.

[62 FR 2399, Jan. 26, 1996, as amended at 62 FR 48477, Sept. 16, 1997]

PART 107—SMALL BUSINESS INVESTMENT COMPANIES

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AUTHORITY: 15 U.S.C. 681 *et seq.*, 683, 687(c), 687b, 687d, 687g and 687m.

SOURCE: 61 FR 3189, Jan. 31, 1996, unless otherwise noted.

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Subpart A—Introduction to Part 107

§ 107.20 Legal basis and applicability of this part 107.

(a) The regulations in this part implement Title III of the Small Business Investment Act of 1958, as amended. All Licensees must comply with all applicable regulations, accounting guidelines and valuation guidelines for Licensees.

(b) Provisions of this part which are not mandated by the Act shall not supersede existing State law. A party claiming that a conflict exists shall submit an opinion of independent counsel, citing authorities, for SBA's resolution of the issues involved.

§ 107.30 Amendments to Act and regulations.

A Licensee shall be subject to all existing and future provisions of the Act and parts 107 and 112 of title 13 of the Code of Federal Regulations.

§ 107.40 How to read this part 107.

(a) *Center Headings.* All references in this part to SBA forms, and instructions for their preparation, are to the current issue of such forms. Center headings are descriptive and are used for convenience only. They have no regulatory effect.

(b) *Capitalizing defined terms.* Terms defined in § 107.50 are capitalized in this part 107.

(c) The pronoun “you” as used in this part 107 means a Licensee or license applicant, as appropriate, unless otherwise noted.

Subpart B—Definition of Terms Used in Part 107

§ 107.50 Definition of terms.

Accumulated Prioritized Payments has the meaning set forth in § 107.1520.

Act means the Small Business Investment Act of 1958, as amended.

Adjustments has the meaning set forth in § 107.1520.

Affiliate or *Affiliates* has the meaning set forth in § 121.103 of this chapter.

Articles mean articles of incorporation or charter for a Corporate Licensee and the partnership agreement

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or certificate for a Partnership Licensee.

Assistance or *Assisted* means Financing of or management services rendered to a Small Business by a Licensee pursuant to the Act and these regulations.

Associate of a Licensee means any of the following:

- (1)(i) An officer, director, employee or agent of a Corporate Licensee;
- (ii) A Control Person, employee or agent of a Partnership Licensee;
- (iii) An Investment Adviser/Manager of any Licensee, including any Person who contracts with a Control Person of a Partnership Licensee to be the Investment Adviser/Manager of such Licensee; or
- (iv) Any Person regularly serving a Licensee on retainer in the capacity of attorney at law.

(2) Any Person who owns or controls, or who has entered into an agreement to own or control, directly or indirectly, at least 10 percent of any class of stock of a Corporate Licensee or a limited partner's interest of at least 10 percent of the partnership capital of a Partnership Licensee. However, a limited partner in a Partnership Licensee is not considered an Associate if such Person is an entity Institutional Investor whose investment in the Partnership, including commitments, represents no more than 33 percent of the partnership capital of the Licensee and no more than five percent of such Person's net worth.

(3) Any officer, director, partner (other than a limited partner), manager, agent, or employee of any Associate described in paragraph (1) or (2) of this definition.

(4) Any Person that directly or indirectly Controls, or is Controlled by, or is under Common Control with, a Licensee.

(5) Any Person that directly or indirectly Controls, or is Controlled by, or is under Common Control with, any Person described in paragraphs (1) and (2) of this definition.

(6) Any Close Relative of any Person described in paragraphs (1),(2), (4), and (5) of this definition.

(7) Any Secondary Relative of any Person described in paragraphs (1), (2), (4), and (5) of this definition.

(8) Any concern in which—

(i) Any person described in paragraphs (1) through (6) of this definition is an officer; general partner, or managing member; or

(ii) Any such Person(s) singly or collectively Control or own, directly or indirectly, an equity interest of at least 10 percent (excluding interests that such Person(s) own indirectly through ownership interests in the Licensee).

(9) Any concern in which any Person(s) described in paragraph (7) of this definition singly or collectively own (including beneficial ownership) a majority equity interest, or otherwise have Control. As used in this paragraph (9), "collectively" means together with any Person(s) described in paragraphs (1) through (7) of this definition.

(10) For the purposes of this definition, if any Associate relationship described in paragraphs (1) through (7) of this definition exists at any time within six months before or after the date that a Licensee provides Financing, then that Associate relationship is considered to exist on the date of the Financing.

(11) If any Licensee has any ownership interest in another Licensee, the two Licensees are Associates of each other.

Capital Impairment has the meaning set forth in §107.1830(c).

Central Registration Agent or *CRA* means one or more agents appointed by SBA for the purpose of issuing TCs and performing the functions enumerated in §107.1620 and performing similar functions for Debentures and Participating Securities funded outside the pooling process.

Charge means an annual fee on Leverage issued on or after October 1, 1996 (except for Leverage issued pursuant to a commitment made by SBA before October 1, 1996), which is payable to SBA by Licensees, subject to the terms and conditions set forth in §107.1130(d).

Close Relative of an individual means:

- (1) A current or former spouse;
- (2) A father, mother, guardian, brother, sister, son, daughter; or
- (3) A father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, or daughter-in-law.

Combined Capital means the sum of Regulatory Capital and outstanding Leverage.

Commitment means a written agreement between a Licensee and an eligible Small Business that obligates the Licensee to provide Financing (except a guarantee) to that Small Business in a fixed or determinable sum, by a fixed or determinable future date. In this context the term “agreement” means that there has been agreement on the principal economic terms of the Financing. The agreement may include reasonable conditions precedent to the Licensee’s obligation to fund the commitment, but these conditions must be outside the Licensee’s control.

Common Control means a condition where two or more Persons, either through ownership, management, contract, or otherwise, are under the Control of one group or Person. Two or more Licensees are presumed to be under Common Control if they are Affiliates of each other by reason of common ownership or common officers, directors, or general partners; or if they are managed or their investments are significantly directed either by a common independent investment advisor or managerial contractor, or by two or more such advisors or contractors that are Affiliates of each other. This presumption may be rebutted by evidence satisfactory to SBA.

Control means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Licensee or other concern, whether through the ownership of voting securities, by contract, or otherwise.

Control Person means any Person that controls a Licensee, either directly or through an intervening entity. A Control Person includes:

- (1) A general partner of a Partnership Licensee;
- (2) Any Person serving as the general partner, officer, director, or manager (in the case of a limited liability company) of any entity that controls a Licensee, either directly or through an intervening entity;
- (3) Any Person that—
 - (i) Controls or owns, directly or through an intervening entity, at least 10 percent of a Partnership Licensee or

any entity described in paragraphs (1) or (2) of this definition; and

(ii) Participates in the investment decisions of the general partner of such Partnership Licensee;

(4) Any Person that controls or owns, directly or through an intervening entity, at least 50 percent of a Partnership Licensee or any entity described in paragraphs (1) or (2) of this definition.

Corporate Licensee. See definition of Licensee in this section.

Cost of Money has the meaning set forth in § 107.855.

Debenture Rate means the interest rate, as published from time to time in the FEDERAL REGISTER by SBA, for ten year debentures issued by Licensees and funded through public sales of certificates bearing SBA’s guarantee. User or guarantee fees, if any, paid by a Licensee are not considered in determining the Debenture Rate.

Debentures means debt obligations issued by Licensees pursuant to section 303(a) of the Act and held or guaranteed by SBA.

Debt Securities has the meaning set forth in § 107.815.

Disadvantaged Business means a Small Business that is at least 50 percent owned, and controlled and managed, on a day to day basis, by a person or persons whose participation in the free enterprise system is hampered because of social or economic disadvantages.

Distributable Securities means equity securities that are determined by SBA (with the advice of a third party expert in the marketing of securities) to meet each of the following requirements:

- (1) The securities (which may include securities that are salable pursuant to the provisions of Rule 144 (17 CFR 230.144) under the Securities Act of 1933, as amended) are salable immediately without restriction under Federal and state securities laws;
- (2) The securities are of a class:
 - (i) Which is listed and registered on a national securities exchange, or
 - (ii) For which quotation information is disseminated in the National Association of Securities Dealers Automated Quotation System and as to which transaction reports and last sale data are disseminated pursuant to Rule

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11Aa3-1 (17 CFR 240.11Aa3-1) under the Securities Exchange Act of 1934, as amended; and

(3) The quantity of such securities to be distributed to SBA can be sold over a reasonable period of time without having an adverse impact upon the price of the security.

Distribution means any transfer of cash or non-cash assets to SBA, its agent or Trustee, or to partners in a Partnership Licensee, or to shareholders in a Corporate Licensee. Capitalization of Retained Earnings Available for Distribution constitutes a Distribution to the Licensee's non-SBA partners or shareholders.

Earmarked Assets has the meaning set forth in §107.1510(b). (See also §107.1590.)

Earmarked Profit (Loss) has the meaning set forth in §107.1510.

Earned Prioritized Payments has the meaning set forth in §107.1520.

Equity Capital Investments means investments in a Small Business in the form of common or preferred stock, limited partnership interests, options, warrants, or similar equity instruments, including subordinated debt with equity features if such debt provides only for interest payments contingent upon and limited to the extent of earnings. Equity Capital Investments must not require amortization. Equity Capital Investments may be guaranteed; however, neither Equity Capital Investments nor such guarantee may be collateralized or otherwise secured. Investments classified as Debt Securities (see §§107.800 and 107.815) are not precluded from qualifying as Equity Capital Investments.

Equity Securities has the meaning set forth in §107.800.

Financing or *Financed* means outstanding financial assistance provided to a Small Business by a Licensee, whether through:

- (1) Loans;
- (2) Debt Securities;
- (3) Equity Securities;
- (4) Guarantees; or
- (5) Purchases of securities of a Small Business through or from an underwriter (see §107.825).

Guaranty Agreement means the contract entered into by SBA which is a guarantee backed by the full faith and

credit of the United States Government as to timely payment of principal and interest on Debentures or the Redemption Price of and Prioritized Payments on Participating Securities and SBA's rights in connection with such guarantee.

Includible Non-Cash Gains means those non-cash gains (as reported on SBA Form 468) that are realized in the form of Publicly Traded and Marketable securities or investment grade debt instruments. For purposes of this definition, investment grade debt instruments means those instruments that are rated "BBB" or "Baa", or better, by Standard & Poor's Corporation or Moody's Investors Service, respectively. Non-rated debt may be considered to be investment grade if Licensee obtains a written opinion from an investment banking firm acceptable to SBA stating that the non-rated debt instrument is equivalent in risk to the issuer's investment grade debt.

Institutional Investor means:

(1) *Entities*. Any of the following entities if the entity has a net worth (exclusive of unfunded commitments from investors) of at least \$1 million, or such higher amount as is specified in paragraph (1) of this definition. (See also §107.230(b)(4) for limitations on the amount of an Institutional Investor's commitment that may be included in Private Capital.)

(i) A State or National bank, trust company, savings bank, or savings and loan association.

(ii) An insurance company.

(iii) A 1940 Act Investment Company or Business Development Company (each as defined in the Investment Company Act of 1940, as amended (15 U.S.C. 8a-1 *et seq.*)).

(iv) A holding company of any entity described in paragraph (1)(i), (ii) or (iii) of this definition.

(v) An employee benefit or pension plan established for the benefit of employees of the Federal government, any State or political subdivision of a State, or any agency or instrumentality of such government unit.

(vi) An employee benefit or pension plan (as defined in the Employee Retirement Income Security Act of 1974, as amended (Pub. L. 93-406, 88 Stat. 829), excluding plans established under

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section 401(k) of the Internal Revenue Code of 1986 (26 U.S.C. 401(k)), as amended).

(vii) A trust, foundation or endowment exempt from Federal income taxation under the Internal Revenue Code of 1986, as amended.

(viii) A corporation, partnership or other entity with a net worth (exclusive of unfunded commitments from investors) of more than \$10 million.

(ix) A State, a political subdivision of a State, or an agency or instrumentality of a State or its political subdivision.

(x) An entity whose primary purpose is to manage and invest non-Federal funds on behalf of at least three Institutional Investors described in paragraphs (1)(i) through (1)(ix) of this definition, each of whom must have at least a 10 percent ownership interest in the entity.

(xi) Any other entity that SBA determines to be an Institutional Investor.

(2) *Individuals.* (i) Any of the following individuals if he/she is also a permanent resident of the United States:

(A) An individual who is an Accredited Investor (as defined in the Securities Act of 1933, as amended (15 U.S.C. 77a–77aa)) and whose commitment to the Licensee is backed by a letter of credit from a State or National bank acceptable to SBA.

(B) An individual whose personal net worth is at least \$2 million and at least ten times the amount of his or her commitment to the Licensee. The individual's personal net worth must not include the value of any equity in his or her most valuable residence.

(C) An individual whose personal net worth (determined in accordance with paragraph (2)(i)(B) of this definition) is at least \$10 million.

(ii) Any individual who is not a permanent resident of the United States but who otherwise satisfies paragraph (2)(i) of this definition *provided* such individual has irrevocably appointed an agent within the United States for the service of process.

Investment Adviser/Manager means any Person who furnishes advice or assistance with respect to operations of a Licensee under a written contract exe-

cuted in accordance with the provisions of § 107.510.

Lending Institution means a concern that is operating under regulations of a state or Federal licensing, supervising, or examining body, or whose shares are publicly traded and listed on a recognized stock exchange or NASDAQ and which has assets in excess of \$500 million; and which, in either case, holds itself out to the public as engaged in the making of commercial and industrial loans and whose lending operations are not for the purpose of financing its own or an Associates's sales or business operations.

Leverage means financial assistance provided to a Licensee by SBA, either through the purchase or guaranty of a Licensee's Debentures or Participating Securities, or the purchase of a Licensee's Preferred Securities, and any other SBA financial assistance evidenced by a security of the Licensee.

Leverageable Capital means Regulatory Capital, excluding unfunded commitments.

Licensee means either a corporation (Corporate Licensee), or a limited partnership organized pursuant to § 107.160 (Partnership Licensee), to which a license has been granted pursuant to the Act. For certain purposes, the Entity General Partner of a Partnership Licensee is treated as if it were a Licensee (see § 107.160(b)(2)).

LMI Enterprise means:

(1) A Small Business that has at least 50% of its employees or tangible assets located in LMI Zone(s) or in which at least 35% of the full-time employees have primary residences in LMI Zone(s), in either case determined as of the time of application for SBIC financing; or

(2) A Small Business that does not meet the requirements of paragraph (1) of this definition as of the time of application for SBIC financing but that certifies at such time that it intends to meet the requirements within 180 days after the closing of the SBIC financing. A Small Business qualifying under this paragraph (2) will no longer be an LMI Enterprise as of the 180th day after the closing of the SBIC financing unless, on or before such date, at least 50% of its employees or tangible assets are located in LMI Zones or at least 35% of

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its full-time employees have primary residences in LMI Zones.

LMI Investment means a financing of an LMI Enterprise, made after September 30, 1999, in the form of equity securities or debt securities that are junior to all existing or future secured borrowings of the business. The debt securities may be guaranteed and may be secured by the assets of the LMI Enterprise, but the guarantee may not be collateralized or otherwise secured.

LMI Zone means any area located within a HUBZone (as defined in 13 CFR 126.103), an Urban Empowerment Zone or Urban Enterprise Community (as designated by the Secretary of the Department of Housing and Urban Development), a Rural Empowerment Zone or Rural Enterprise Community (as designated by the Secretary of the Department of Agriculture), an area of Low Income or Moderate Income (as recognized by the Federal Financial Institutions Examination Council), or a county with Persistent Poverty (as classified by the Economic Research Service of the Department of Agriculture).

Loan has the meaning set forth in § 107.810.

Loans and Investments means Portfolio Securities, Assets Acquired in Liquidation of Portfolio Securities, Operating Concerns Acquired, and Notes and Other Securities Received, as set forth in the Statement of Financial Position of SBA Form 468.

Management Expenses has the meaning set forth in § 107.520.

1940 Act Company means a Licensee which is registered under the Investment Company Act of 1940.

1980 Act Company means a Licensee which is registered under the Small Business Investment Incentive Act of 1980.

Original Issue Price means the price paid by the purchaser for securities at the time of issuance.

Participating Securities means preferred stock, preferred limited partnership interests, or similar instruments issued by Licensees, including debentures having interest payable only to the extent of earnings, all of which are subject to the terms set forth in §§ 107.1500 through 107.1590 and section 303(g) of the Act.

Partnership Licensee. See definition of Licensee in this section.

Payment Date means, for a Participating Securities issuer, each February 1, May 1, August 1, and November 1 during the term of a Participating Security.

Person means a natural person or legal entity.

Pool means an aggregation of SBA guaranteed Debentures or SBA guaranteed Participating Securities approved by SBA.

Portfolio means the securities representing a Licensee's total outstanding Financing of Small Businesses. It does not include idle funds or assets acquired in liquidation of Portfolio securities.

Portfolio Concern means a Small Business Assisted by a Licensee.

Preferred Securities means nonvoting preferred stock or nonvoting limited partnership interests issued to SBA prior to October 1, 1996, by a Section 301(d) Licensee. Such securities were issued at par value in the case of preferred stock, or at face value in the case of preferred limited partnership interests.

Prioritized Payments has the meaning set forth in § 107.1520.

Private Capital has the meaning set forth in § 107.230.

Profit Participation has the meaning set forth in § 107.1500(c)(3).

Publicly Traded and Marketable means securities that are salable without restriction or that are salable within 12 months pursuant to Rule 144 (17 CFR 230.144) of the Securities Act of 1933, as amended, by the holder thereof (or in the case of an In-kind Distribution by the distributee thereof), and are of a class which is traded on a regulated stock exchange, or is listed in the Automated Quotation System of the National Association of Securities Dealers (NASDAQ), or has, at a minimum, at least two market makers as defined in the relevant sections of the Securities Exchange Act of 1934, as amended (15 U.S.C. 77b *et seq.*), and in all cases the quantity of which can be sold over a reasonable period of time without having an adverse impact upon the price of the stock.

Qualified Non-private Funds has the meaning set forth in § 107.230.

Redemption Price means the amount required to be paid by the issuer, or successor to the issuer, of Preferred or Participating Securities to repurchase such securities from the holder. The Redemption Price shall be the Original Issue Price less any prepayments or prior redemptions.

Regulatory Capital means:

(1) *General.* Regulatory Capital means Private Capital, excluding non-cash assets contributed to a Licensee or a license applicant, and non-cash assets purchased by a license applicant, unless such assets have been converted to cash or have been approved by SBA for inclusion in Regulatory Capital. For purposes of this definition, sales of contributed non-cash assets with recourse or borrowing against such assets shall not constitute a conversion to cash.

(2) *Exclusion of questionable commitments.* An investor's commitment to a Licensee is excluded from Regulatory Capital if SBA determines that the collectibility of the commitment is questionable.

Retained Earnings Available for Distribution means Undistributed Net Realized Earnings less any Unrealized Depreciation on Loans and Investments (as reported on SBA Form 468), and represents the amount that a Licensee may distribute to investors (including SBA) as a profit Distribution, or transfer to Private Capital.

SBA means the Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Secondary Relative of an individual means:

(1) A grandparent, grandchild, or any other ancestor or lineal descendent who is not a Close Relative;

(2) An uncle, aunt, nephew, niece, or first cousin; or

(3) A spouse of any person described in paragraph (1) or (2) of this definition.

Section 301(c) Licensee has the meaning set forth in § 107.100.

Section 301(d) Licensee means a company licensed prior to October 1, 1996 under section 301(d) of the Act as in effect on the date of licensing, that may provide Assistance only to Disadvantaged Businesses. A Section 301(d) Licensee may be organized as a for-profit

corporation, as a non-profit corporation, or as a limited partnership.

Short-term Financing means Financing for a term of less than five years in accordance with the regulations.

SIC Manual means the latest issue of the Standard Industrial Classification Manual, prepared by the Office of Management and Budget, and available from the U.S. Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, Pa., 15250-7954.

Small Business means a small business concern as defined in section 103(5) of the Act (including its Affiliates), which for purposes of size eligibility, meets the applicable criteria set forth in part 121 of this chapter.

Smaller Enterprise has the meaning set forth in § 107.710.

Start-up Financing means an Equity Capital Investment in a Small Business that—

(1) Has not had sales exceeding \$3,000,000 or positive cash flow from operations in any of its last three full fiscal years; and

(2) Was not formed to acquire any existing business, unless the acquired business satisfies paragraphs (1) and (2) of this definition.

Temporary Debt has the meaning set forth in § 107.570.

Trust means the legal entity created for the purpose of holding guaranteed Debentures or Participating Securities and the guaranty agreement related thereto, receiving, holding and making any related payments, and accounting for such payments.

Trust Certificate Rate means a fixed rate determined by the Secretary of the Treasury at the time Participating Securities or Debentures are pooled, taking into consideration the current average market yield on outstanding marketable obligations of the United States with maturities comparable to the maturities of the Trust Certificates being guaranteed by SBA, adjusted to the nearest one-eighth of one percent.

Trust Certificates (TCs) means certificates issued by SBA, its agent or Trustee and representing ownership of all or a fractional part of a Trust or Pool of Debentures or Participating Securities.

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Trustee means the trustee or trustees of a Trust.

Undistributed Net Realized Earnings means Undistributed Realized Earnings less Non-cash Gains/Income, each as reported on SBA Form 468.

Unrealized Appreciation means the amount by which a Licensee's valuation of each of its Loans and Investments, as determined by its Board of Directors or General Partner(s) in accordance with Licensee's valuation policies, exceeds the cost basis thereof.

Unrealized Depreciation means the amount by which a Licensee's valuation of each of its Loans and Investments, as determined by its Board of Directors or General Partner(s) in accordance with Licensee's valuation policies, is below the cost basis thereof.

Unrealized Gain (Loss) on Securities Held means the sum of the Unrealized Appreciation and Unrealized Depreciation on all of a Licensee's Loans and Investments, less estimated future income tax expense or estimated realizable future income tax benefit, as appropriate.

Venture Capital Financing has the meaning set forth in § 107.1160.

Wind-up Plan has the meaning set forth in § 107.590.

[61 FR 3189, Jan. 31, 1996; 61 FR 41496, Aug. 9, 1996, as amended at 62 FR 11759, Mar. 13, 1997; 63 FR 5865, Feb. 5, 1998; 64 FR 52645, Sept. 30, 1999; 64 FR 70995, Dec. 20, 1999]

Subpart C—Qualifying for an SBIC License

ORGANIZING AN SBIC

§ 107.100 Organizing a Section 301(c) Licensee.

Section 301(c) Licensee means a company licensed under section 301(c) of the Act. It may be organized as a for-profit corporation or as a limited partnership created in accordance with the special rules of § 107.160.

§ 107.115 1940 Act and 1980 Act Companies.

A 1940 Act or 1980 Act Company is eligible to apply for an SBIC license, and an existing Licensee is eligible to apply for SBA's approval to convert to a 1940

Act or 1980 Act Company. In either case, the 1940 Act or 1980 Act Company may elect to be taxed as a regulated investment company under section 851 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 851). However, a Licensee making such election may make Distributions only as permitted under the applicable sections of this part (see the definition of Retained Earnings Available for Distribution, § 107.585, and §§ 107.1540 through 107.1580).

§ 107.120 Special rules for a Section 301(d) Licensee owned by another Licensee.

With SBA's prior written approval, a Section 301(d) Licensee may operate as the subsidiary of one or more Licensees (participant Licensees), subject to the following:

(a) Each participant Licensee must own at least 20 percent of the voting securities of the Section 301(d) Licensee.

(b) A participant Licensee must treat its entire capital contribution to the subsidiary as a reduction of its Leverageable Capital. The participant Licensee's remaining Leverageable Capital must be sufficient to support its outstanding Leverage.

(c) A participant Licensee may not transfer its Leverage to a subsidiary Section 301(d) Licensee.

[63 FR 5865, Feb. 5, 1998]

§ 107.130 Requirement for qualified management.

When applying for a license, you must show, to the satisfaction of SBA, that your current or proposed management is qualified and has the knowledge, experience, and capability necessary for investing in the types of businesses contemplated by the Act, these regulations and your business plan. You must designate at least one individual as the official responsible for contact with SBA.

§ 107.140 SBA approval of initial Management Expenses.

If you plan to obtain Leverage, you must have your Management Expenses approved by SBA at the time of licensing. (See § 107.520 for the definition of Management Expenses.)

§ 107.150 Management and ownership diversity requirement.

You must have diversity between management and ownership in order to be licensed, unless you do not plan to obtain Leverage. To establish diversity, you must meet the requirements in paragraphs (a) and (b) of this section unless SBA approves otherwise.

(a) *Requirement one.* You must satisfy either paragraph (a)(1) or paragraph (a)(2) of this section.

(1) At least 30 percent of your Regulatory Capital and Leverageable Capital must be owned by Persons unrelated to management. To satisfy this requirement, such Persons must not be your Associates (except for their status as your shareholders or limited partners) and must not Control, be Controlled by, or be under Common Control with any of your Associates. You must have as investors at least three such Persons who are not Affiliates of one another and whose investments are significant in both dollar and percentage terms, as determined by SBA. As an alternative, you may substitute one investor who is an acceptable Institutional Investor for the three investors who are otherwise required. For purposes of this paragraph (a)(1), the following Institutional Investors are acceptable:

- (i) Entities regulated by state or Federal authorities satisfactory to SBA;
- (ii) Public or private employee pension funds;
- (iii) Trusts, foundations, or endowments which are exempt from Federal income taxation; or
- (iv) Other Institutional Investors satisfactory to SBA.

(2) Your common stock or limited partnership interests are publicly traded.

(b) *Requirement two.* Your shareholders or limited partners may not delegate their voting rights to any other Person without prior SBA approval. This restriction does not apply to:

- (1) Publicly traded Licensees.
- (2) Proxies given to vote at single specified meetings.
- (3) Delegations of voting rights by your investors to their investment advisors, provided such advisors are not

your Associates (except for their status as your shareholder or partner).

(c) *Diversity based on Licensee's parent company.* If you do not have diversity as defined in paragraphs (a) and (b) of this section, SBA in its sole discretion may accept diversity achieved on the same basis through your parent company as a substitute. As used in this paragraph (c), "parent company" means an entity that directly or indirectly has an interest of more than 50 percent of your Regulatory Capital.

(d) *Requirement to maintain diversity after licensing.* If you were required to have diversity between management and ownership at the time you were licensed, you must maintain such diversity while you have outstanding Leverage or Earmarked Assets, unless SBA approves otherwise. If, at any time, you no longer satisfy the diversity criteria in paragraph (a) or (b) of this section, you must:

- (1) Notify SBA within 10 days; and
- (2) Re-establish diversity within six months.

(e) *Exception to diversity rule.* This § 107.150 does not apply if you are not licensed to issue participating securities and:

- (1) You received your license before November 28, 1995; or
- (2) SBA received your license application before November 28, 1995 and, as of such date, you had raised the funds needed to begin operations as contemplated in your business plan.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5866, Feb. 5, 1998]

§ 107.160 Special rules for Licensees formed as limited partnerships.

A limited partnership organized under State law solely for the purpose of performing the functions and conducting the activities contemplated under the Act may apply for a license under section 301(c) or section 301 (d) of the Act ("Partnership Licensee").

(a) *Number of Licensee's General Partners.* If you are a Partnership Licensee, you must have as your general partner(s) at least two individuals, or at least one corporation, partnership, or limited liability company (LLC), or any combination of individuals, corporations, partnerships, or LLCs.

(b) *Entity General Partner of Licensee.* A general partner which is a corporation, limited liability company or partnership (an "Entity General Partner") shall be organized under state law solely for the purpose of serving as the general partner of one or more Licensees.

(1) SBA must approve any person who will serve as an officer, director, manager, or general partner of the Entity General Partner. This provision must be stated in an Entity General Partner's Certificate of Incorporation, member agreement, Limited Partnership Agreement or other similar governing instrument which must, in each case, accompany the license application.

(2) An Entity General Partner is subject to the same examination and reporting requirements as a Licensee under section 310(b) of the Act. The restrictions and obligations imposed upon a Licensee by §§107.1800 through 107.1820, and 107.30, 107.410 through 107.450, 107.470, 107.475, 107.500, 107.510, 107.585, 107.600, 107.680, 107.690 through 107.692, 107.865, and 107.1910 apply also to an Entity General Partner of a Licensee.

(3) The general partner(s) of your Entity General Partner(s) will be considered your general partner.

(4) If your Entity General Partner is a limited partnership, its limited partners may be considered your Control Person(s) if they meet the definition for Control Person in §107.50.

(5) If your Entity General Partner is a limited partnership, it is subject to paragraph (a) of this section.

(c) *Other requirements for Partnership Licensees.* If you are a Partnership Licensee:

(1) You must have a minimum duration of ten years or two years following the maturity of your last-maturing Leverage security, whichever is longer. After 10 years, if all Leverage has been repaid or redeemed and all amounts due SBA, its agent, or Trustee have been paid, the Partnership Licensee may be terminated by a vote of your partners. (For purposes of this provision SBA is not considered a partner.);

(2) None of your general partner(s) may be removed or replaced by your limited partners without prior written approval of SBA;

(3) Any transferee of, or successor in interest to, your general partner shall have only the rights and liabilities of a limited partner pending SBA's written approval of such transfer or succession; and

(4) You must incorporate all the provisions in this paragraph (c) in your Limited Partnership Agreement.

(d) *Obligations of a Control Person.* All Control Persons are bound by the disciplinary provisions of sections 313 and 314 of the Act and by the conflict-of-interest rules under section 312 of the Act. The term Licensee, as used in §§107.30, 107.460, and 107.680 includes all of the Licensee's Control Persons. The term Licensee as used in §107.670 includes only the Licensee's general partner(s). The conditions specified in §§107.1800 through 107.1820 and §107.1910 apply to all general partners.

(e) *Liability of general partner for partnership debts to SBA.* Subject to section 314 of the Act, your general partner is not liable solely by reason of its status as a general partner for repayment of any Leverage or debts you owe to SBA unless SBA, in the exercise of reasonable investment prudence, and with regard to your financial soundness, determines otherwise prior to the purchase or guaranty of your Leverage.

(f) *Reorganization of Licensee.* A corporate Licensee wishing to reorganize as a Partnership Licensee, or a Partnership Licensee wishing to reorganize as a Corporate Licensee, may apply to SBA for approval under §107.470.

(g) *Special Leverage requirement.* Before your first issuance of Leverage, you must furnish SBA with evidence that you qualify as a partnership for tax purposes, either by a ruling from the Internal Revenue Service, or by an opinion of counsel.

CAPITALIZING AN SBIC

§ 107.200 Adequate capital for Licensees.

You must meet the requirements of this §107.200 to qualify for a license, to continue as a Licensee, and to receive Leverage.

(a) You must have enough Regulatory Capital to provide reasonable assurance that:

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(1) You will operate soundly and profitably over the long term; and

(2) You will be able to operate actively in accordance with your Articles and within the context of your business plan, as approved by SBA.

(b) In SBA's sole discretion, you must be economically viable, taking into consideration actual and anticipated income and losses on your Loans and Investments, and the experience and qualifications of your owners and managers.

§ 107.210 Minimum capital requirements for Licensees.

(a) *Companies licensed on or after October 1, 1996.* A company licensed on or after October 1, 1996 must have Leverageable Capital of at least \$2,500,000 and must meet the applicable minimum Regulatory Capital requirement:

(1) *Licensees other than Participating Securities issuers.* A Licensee that does not wish to be eligible to apply for Participating Securities must have Regulatory Capital of at least \$5,000,000. As an exception to this general rule, SBA in its sole discretion and based on a showing of special circumstances and good cause may license an applicant with Regulatory Capital of at least \$3,000,000, but only if the applicant:

(i) Has satisfied all licensing standards and requirements except the minimum capital requirement, as determined solely by SBA;

(ii) Has a viable business plan reasonably projecting profitable operations; and

(iii) Has a reasonable timetable for achieving Regulatory Capital of at least \$5,000,000.

(2) *Participating Securities issuers.* A Licensee that wishes to be eligible to apply for Participating Securities must have Regulatory Capital of at least \$10,000,000, unless it demonstrates to SBA's satisfaction that it can be financially viable over the long term with a lower amount. Under no circumstances can the Licensee have Regulatory Capital of less than \$5,000,000.

(b) *Companies licensed before October 1, 1996.* A company licensed before October 1, 1996 must meet the minimum capital requirements applicable to such company, as required by the regula-

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tions in effect on September 30, 1996. See § 107.1120(c)(2) for Leverage eligibility requirements.

[63 FR 5866, Feb. 5, 1998]

§ 107.230 Permitted sources of Private Capital for Licensees.

Private Capital means the contributed capital of a Licensee, plus unfunded binding commitments by Institutional Investors (including commitments evidenced by a promissory note) to contribute capital to a Licensee.

(a) *Contributed capital.* For purposes of this section, contributed capital means the paid-in capital and paid-in surplus of a Corporate Licensee, or the partners' contributed capital of a Partnership Licensee, in either case subject to the limitations in paragraph (b) of this section.

(b) *Exclusions from Private Capital.* Private Capital does not include:

(1) Funds borrowed by a Licensee from any source.

(2) Funds obtained through the issuance of Leverage.

(3) Funds obtained directly or indirectly from any Federal, State, or local government agency or instrumentality, except for:

(i) Funds invested by a public pension fund;

(ii) Funds obtained from the business revenues (excluding any governmental appropriation) of any federally chartered or government-sponsored corporation established before October 1, 1987, to the extent that such revenues are reflected in the retained earnings of the corporation; and

(iii) "Qualified Non-private Funds" as defined in paragraph (d) of this section.

(4) Any portion of a commitment from an Institutional Investor with a net worth of less than \$10 million that exceeds 10 percent of such Institutional Investor's net worth and is not backed by a letter of credit from a State or National bank acceptable to SBA.

(c) *Non-cash capital contributions.* Capital contributions in a form other than cash are subject to the limitations in § 107.240.

(d) *Qualified Non-private Funds.* Private Capital includes "Qualified Non-

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private Funds” as defined in this paragraph (d); however, investors of Qualified Non-private Funds must not control, directly or indirectly, a Licensee’s management, or its board of directors or general partner(s). Qualified Non-private Funds are:

(1) Funds directly or indirectly invested in any Licensee on or before August 16, 1982 by any Federal agency except SBA, under a statute explicitly mandating the inclusion of such funds in “Private Capital”;

(2) Funds directly or indirectly invested in any Licensee by any Federal agency under a statute that is enacted after September 4, 1992, explicitly mandating the inclusion of such funds in “Private Capital”;

(3) Funds invested in any Licensee or license applicant by one or more State or local government entities (including any guarantee extended by such entities) in an aggregate amount that does not exceed 33 percent of Regulatory Capital; and

(4) Funds invested in or committed in writing to any Section 301(d) Licensee prior to October 1, 1996, from the following sources:

(i) A State financing agency, or similar agency or instrumentality, if the funds invested are derived from such agency’s net income and not from appropriated State or local funds; and

(ii) Grants made by a state or local government agency or instrumentality into a nonprofit corporation or institution exercising discretionary authority with respect to such funds, if SBA determines that such funds have taken on a private character and the nonprofit corporation or institution is not a mere conduit.

(e) You may not accept any capital contribution made with funds borrowed by a Person seeking to own an equity interest (whether direct or indirect, beneficial or of record) of at least 10 percent of your Private Capital. This exclusion does not apply if:

(1) Such Person’s net worth is at least twice the amount borrowed; or

(2) SBA gives its prior written approval of the capital contribution.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5866, Feb. 5, 1998; 64 FR 70995, Dec. 20, 1999]

§ 107.240 Limitations on including non-cash capital contributions in Private Capital.

Non-cash capital contributions to a Licensee or license applicant are included in Private Capital only if they fall into one of the following categories:

(a) Direct obligations of, or obligations guaranteed as to principal and interest by, the United States.

(b) Services rendered or to be rendered to you, priced at no more than their fair market value.

(c) Tangible assets used in your operations, priced at no more than their fair market value.

(d) Shares in a Disadvantaged Business received by a subsidiary Section 301(d) Licensee from its parent Licensee, valued at the lower of cost or fair value.

(e) Other non-cash assets approved by SBA.

§ 107.250 Exclusion of stock options issued by Licensee from Management Expenses.

Stock options issued by any Licensee, including a 1940 or 1980 Act Company, are not considered compensation and therefore do not count as part of a Licensee’s Management Expenses.

APPLYING FOR AN SBIC LICENSE

§ 107.300 License application form and fee.

The license application must be submitted on SBA Form 415 together with a processing fee computed as follows:

(a) All license applicants will pay a base fee of \$10,000.

(b) All applicants who will be Partnership Licensees will pay an additional \$5,000 fee, for a total of \$15,000.

(c) All applicants who will be issuing Participating Securities will pay an additional \$5,000 fee, for a total of \$15,000, or a total fee of \$20,000 if they also intend to be Partnership Licensees.

Subpart D—Changes in Ownership, Control, or Structure of Licensee; Transfer of License

CHANGES IN CONTROL OR OWNERSHIP OF LICENSEE

§ 107.400 Changes in ownership of 10 percent or more of Licensee but no change of Control.

(a) *Prior approval requirements.* You must obtain SBA's prior written approval for any proposed transfer or issuance of ownership interests that results in the ownership (beneficial or of record) by any Person, or group of Persons acting in concert, of at least 10 percent of any class of your stock or partnership capital.

(b) *Fee.* A processing fee of \$200 must accompany each such request for approval of a change of ownership.

§ 107.410 Changes in Control of Licensee (through change in ownership or otherwise).

(a) *Prior approval requirements.* You must obtain SBA's prior written approval for any proposed transaction or event that results in Control by any Person(s) not previously approved by SBA.

(b) *Fee.* A processing fee of \$10,000 must accompany any application for approval of one or more transactions or events that will result in a transfer of Control.

§ 107.420 Prohibition on exercise of ownership or Control rights in Licensee before SBA approval.

Without prior written SBA approval, no change of ownership or Control may take effect and no officer, director, employee or other Person acting on your behalf shall:

(a) Register on your books any transfer of ownership interest to the proposed new owner(s);

(b) Permit the proposed new owner(s) to exercise voting rights with respect to such ownership interest (including directly or indirectly procuring or voting any proxy, consent or authorization as to such voting rights at any shareholders' or partnership meeting);

(c) Permit the proposed new owner(s) to participate in any manner in the

conduct of your affairs (including exercising control over your books, records, funds or other assets; participating directly or indirectly in any disposition thereof; or serving as an officer, director, partner, employee or agent); or

(d) Allow ownership or Control to pass to another Person.

§ 107.430 Notification to SBA of transactions that may change ownership or Control.

You must promptly notify SBA as soon as you have knowledge of transactions or events that may result in a transfer of Control or ownership of at least 10 percent of your capital. If there is any doubt as to whether a particular transaction or event will result in such a change, report the facts to SBA.

§ 107.440 Standards governing prior SBA approval for a proposed transfer of Control.

SBA approval is contingent upon full disclosure of the real parties in interest, the source of funds for the new owners' interest, and other data requested by SBA. As a condition of approving a proposed transfer of control, SBA may:

(a) Require an increase in your Regulatory Capital;

(b) Require the new owners or the transferee's Control Person(s) to assume, in writing, personal liability for your Leverage, effective only in the event of their direct or indirect participation in any transfer of Control not approved by SBA; or

(c) Require compliance with any other conditions set by SBA.

§ 107.450 Notification to SBA of pledge of Licensee's shares.

(a) You must notify SBA in writing, within 30 calendar days, of the terms of any transaction in which:

(1) Any Person, or group of Persons acting in concert, pledges shares of your stock (or equivalent ownership interests) as collateral for indebtedness; and

(2) The shares pledged are at least 10 percent of your Regulatory Capital.

(b) If the transaction creates a change of ownership or Control, you must comply with § 107.400 or § 107.410, as appropriate.

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RESTRICTIONS ON COMMON CONTROL OR OWNERSHIP OF TWO OR MORE LICENSEES

§ 107.460 Restrictions on Common Control or ownership of two (or more) Licensees.

(a) *General rule.* Without SBA's prior written approval, you must not have an officer, director, manager, Control Person, or owner (with a direct or indirect ownership interest of at least 10 percent) who is also:

(1) An officer, director, manager, Control Person, or owner (with a direct or indirect ownership interest of at least 10 percent) of another Licensee; or

(2) An officer or director of any Person that directly or indirectly controls, or is controlled by, or is under Common Control with, another Licensee.

(b) *Exceptions to general rule.* This § 107.460 does not apply to:

(1) Common officers, directors, managers, or owners of a Section 301(c) Licensee and its Section 301(d) subsidiary; or

(2) Common officers, directors, managers, Control Persons, or owners of two (or more) Licensees which have no Leverage.

CHANGE IN STRUCTURE OF LICENSEE

§ 107.470 SBA approval of merger, consolidation, or reorganization of Licensee.

(a) *Prior approval requirements.* You may not merge, consolidate, change form of organization (corporation or partnership) or reorganize without SBA's prior written approval. Any such merger or consolidation will be subject to § 107.440.

(b) *Fee.* A processing fee of \$5,000 must accompany any application for approval of a change in your form of organization (from corporation to partnership or partnership to corporation).

TRANSFER OF LICENSE

§ 107.475 Transfer of license.

You may not transfer your license in any manner without SBA's prior written approval.

Subpart E—Managing the Operations of a Licensee

GENERAL REQUIREMENTS

§ 107.500 Lawful operations under the Act.

You must engage only in the activities contemplated by the Act and in no other activities.

§ 107.501 Identification as a Licensee.

You must display your SBIC license in a prominent location. You must also have a listed telephone number. Before collecting an application fee or extending Financing to a Small Business, you must obtain a written statement from the concern acknowledging its awareness that you are "a Federal licensee under the Small Business Investment Act of 1958, as amended."

§ 107.502 Representations to the public.

You may not represent or imply to anyone that the SBA, the U.S. Government or any of its agencies or officers has approved any ownership interests you have issued or obligations you have incurred. Be certain to include a statement to this effect in any solicitation to investors. Example: You may not represent or imply that "SBA stands behind the Licensee" or that "Your capital is safe because SBA's experts review proposed investments to make sure they are safe for the Licensee."

§ 107.503 Licensee's adoption of an approved valuation policy.

(a) *Valuation guidelines.* You must prepare, document and report the valuations of your Loans and Investments in accordance with the Valuation Guidelines for SBICs issued by SBA. These guidelines may be obtained from SBA's Investment Division.

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(b) *SBA approval of valuation policy.* You must have a written valuation policy approved by SBA for use in determining the value of your Loans and Investments. You must either:

(1) Adopt without change the model valuation policy set forth in section III of the Valuation Guidelines for SBICs; or

(2) Obtain SBA's prior written approval of an alternative valuation policy.

(c) *Responsibility for valuations.* Your board of directors or general partner(s) will be solely responsible for adopting your valuation policy and for using it to prepare valuations of your Loans and Investments for submission to SBA. If SBA reasonably believes that your valuations, individually or in the aggregate, are materially misstated, it reserves the right to require you to engage, at your expense, an independent third party, acceptable to SBA, to substantiate the valuations.

(d) *Frequency of valuations.* (1) If you have outstanding Leverage or Earmarked Assets, you must value your Loans and Investments at the end of the second quarter of your fiscal year, and at the end of your fiscal year.

(2) Otherwise, you must value your Loans and Investments only at your fiscal year end.

(3) On a case-by-case basis, SBA may require you to perform valuations more frequently.

(4) You must report material adverse changes in valuations at least quarterly, within thirty days following the close of the quarter.

(e) *Review of valuations by independent public accountant.* (1) For valuations performed as of the end of your fiscal year, your independent public accountant must review your valuation procedures and the implementation of such procedures, including adequacy of documentation.

(2) The independent public accountant's report on your audited annual financial statements (SBA Form 468) must include a statement that your valuations were prepared in accordance with your approved valuation policy established in accordance with section 310(d)(2) of the Act.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5866, Feb. 5, 1998]

§ 107.504 Equipment and office requirements.

(a) *Computer capability.* You must have a personal computer with a modem, and be able to use this equipment to prepare reports (using SBA-provided software) and transmit them to SBA. In addition, by March 31, 2000, you must have access to the Internet and the capability to send and receive electronic mail via the Internet.

(b) *Facsimile capability.* You must be able to receive facsimile messages 24 hours per day at your primary office.

(c) *Accessible office.* You must maintain an office that is convenient to the public and is open for business during normal working hours.

[64 FR 70995, Dec. 20, 1999]

§ 107.505 Facsimile requirement.

You must be able to receive fax messages 24 hours per day at your primary office.

§ 107.506 Safeguarding Licensee's assets/Internal controls.

You must adopt a plan to safeguard your assets and monitor the reliability of your financial data, personnel, Portfolio, funds and equipment. You must provide your bank and custodian with a certified copy of your resolution or other formal document describing your control procedures.

§ 107.507 Violations based on false filings and nonperformance of agreements with SBA.

The following shall constitute a violation of this part:

(a) *Nonperformance.* Nonperformance of any of the requirements of any Debenture, Participating Security or Preferred Security, or of any written agreement with SBA.

(b) *False statement.* In any document submitted to SBA:

(1) Any false statement knowingly made; or

(2) Any misrepresentation of a material fact; or

(3) Any failure to state a material fact. A material fact is any fact which is necessary to make a statement not misleading in light of the circumstances under which the statement was made.

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§ 107.509 Employment of SBA officials.

Without SBA's prior written approval, for a period of two years after the date of your most recent issuance of Leverage (or the receipt of any SBA Assistance as defined in part 105 of this chapter), you are not permitted to employ, offer employment to, or retain for professional services, any person who:

(a) Served as an officer, attorney, agent, or employee of SBA on or within one year before such date; and

(b) As such, occupied a position or engaged in activities which, in SBA's determination, involved discretion with respect to the granting of Assistance under the Act.

MANAGEMENT AND COMPENSATION

§ 107.510 SBA approval of Licensee's Investment Adviser/Manager.

You may employ an Investment Adviser/Manager who will be subject to the supervision of your board of directors or general partner. If you have Leverage or plan to seek Leverage, you must obtain SBA's prior written approval of the management contract. SBA's approval of an Investment Adviser/Manager for one Licensee does not indicate approval of that manager for any other Licensee.

(a) *Management contract.* The contract must:

(1) Specify the services the Investment Adviser/Manager will render to you and to the Small Businesses in your Portfolio; and

(2) Indicate the basis for computing Management Expenses.

(b) *Material change to approved management contract.* If there is a material change, both you and SBA must approve such change in advance. If you are uncertain if the change is material, submit the proposed revision to SBA.

§ 107.520 Management Expenses of a Licensee.

SBA must approve any increases in your Management Expenses if you have outstanding Leverage or Earmarked Assets.

(a) *Definition of Management Expenses.* Management Expenses include:

(1) Salaries;

(2) Office expenses;

(3) Travel;

(4) Business development;

(5) Office and equipment rental;

(6) Bookkeeping; and

(7) Expenses related to developing, investigating and monitoring investments.

(b) Management Expenses do not include services provided by specialized outside consultants, outside lawyers and independent public accountants, if they perform services not generally performed by a venture capital company.

(c) If your Management Expenses have not already been approved by SBA, you must submit such expenses for approval with your SBA Form 468 for your first fiscal year ending after January 31, 1996.

CASH MANAGEMENT BY A LICENSEE

§ 107.530 Restrictions on investments of idle funds by leveraged Licensees.

(a) *Applicability of this section.* This § 107.530 applies if you have outstanding Leverage or if you have applied for Leverage.

(b) *Permitted investments of idle funds.* Funds not invested in Small Businesses must be maintained in:

(1) Direct obligations of, or obligations guaranteed as to principal and interest by, the United States, which mature within 15 months from the date of the investment; or

(2) Repurchase agreements with federally insured institutions, with a maturity of seven days or less. The securities underlying the repurchase agreements must be direct obligations of, or obligations guaranteed as to principal and interest by, the United States. The securities must be maintained in a custodial account at a federally insured institution; or

(3) Certificates of deposit with a maturity of one year or less, issued by a federally insured institution; or

(4) A deposit account in a federally insured institution, subject to a withdrawal restriction of one year or less; or

(5) A checking account in a federally insured institution; or

(6) A reasonable petty cash fund.

(c) *Deposit of funds in excess of the insured amount.* (1) You are permitted to deposit funds in a federally insured institution in excess of the institution's insured amount, but only if the institution is "well capitalized" in accordance with the definition set forth in regulations of the Federal Deposit Insurance Corporation, as amended (12 CFR 325.103).

(2) Exception: You may make a temporary deposit (not to exceed 30 days) in excess of the insured amount, in a transfer account established to facilitate the receipt and disbursement of funds or to hold funds necessary to honor Commitments issued.

(d) *Deposit of funds in Associate institution.* A deposit in, or a repurchase agreement with, a federally insured institution that is your Associate is not considered a Financing of such Associate under § 107.730, provided the terms of such deposit or repurchase agreement are no less favorable than those available to the general public.

BORROWING BY LICENSEES FROM NON-SBA SOURCES

§ 107.550 Prior approval of secured third-party debt of leveraged Licensees.

(a) *Definition.* In this § 107.550, "secured third-party debt" means any non-SBA debt secured by any of your assets, including secured guarantees and other contingent obligations that you voluntarily assume, secured lines of credit, and secured Temporary Debt of a Licensee with outstanding Participating Securities.

(b) *General rule.* If you have outstanding Leverage, you must get SBA's written approval before you incur any secured third-party debt or refinance any debt with secured third-party debt, including any renewal of a secured line of credit, increase in the maximum amount available under a secured line of credit, or expansion of the scope of a security interest or lien. For purposes of this paragraph (b), "expansion of the scope of a security interest or lien" does not include the substitution of one asset or group of assets for another, provided the asset values (as re-

ported on your most recent annual Form 468) are comparable.

(c) *Additional rule for secured lines of credit in existence on April 8, 1994.* If you have outstanding Leverage and you have a secured line of credit that was created on or before April 8, 1994, you must receive SBA's written approval of the line before you increase the amounts outstanding thereunder.

(d) *Conditions for SBA approval.* As a condition of granting its approval under this § 107.550, SBA may impose such restrictions or limitations as it deems appropriate, taking into account your historical performance, current financial position, proposed terms of the secured debt and amount of aggregate debt you will have outstanding (including Leverage). SBA will not favorably consider any requests for approval which include a blanket lien on all your assets, or a security interest in your investor commitments in excess of 125 percent of the proposed borrowing.

(e) *Thirty day approval.* Unless SBA notifies you otherwise within 30 days after it receives your request, you may consider your request automatically approved if:

- (1) You are in regulatory compliance;
- (2) The security interest in your assets is limited to either those assets being acquired with the borrowed funds or an asset coverage ratio of no more than 2:1;
- (3) Your Leverage does not exceed 150 percent of your Leverageable Capital; and
- (4) Your request is for approval of a secured line of credit that would not cause your total outstanding borrowings (not including Leverage) to exceed 50 percent of your Leverageable Capital.

§ 107.560 Subordination of SBA's creditor position.

(a) *Debentures purchased or guaranteed on or before July 1, 1991.* Under the terms of any Debenture purchased or guaranteed by SBA on or before July 1, 1991, SBA's unsecured claims against you, as a Debenture-holder or as subrogee, are subordinated in favor of all your other creditors, except to the extent that such claims may be subject

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to equitable subordination in SBA's favor.

(b) *Debentures purchased or guaranteed after July 1, 1991, including refinancings of Debentures previously purchased or guaranteed.* (1) Under the terms of any Debenture purchased or guaranteed by SBA after July 1, 1991, SBA's unsecured claims against you, as a Debentureholder or as subrogee, are subordinated only in favor of non-Associate lenders; and, to the extent that your indebtedness to such lenders exceeds the lesser of \$10,000,000 or 200 percent of your Regulatory Capital (determined as of the date your Debentures were purchased or guaranteed), SBA's unsecured claims enjoy parity with those of other unsecured creditors, except with respect to indebtedness created on or before July 1, 1991.

(2) In order to induce others to lend you money after your Debenture has been purchased or guaranteed, SBA may agree in writing on a case-by-case basis to subordinate its unsecured claims, on such terms as it may determine, in favor of one or more of your Associates, or in favor of other lenders in excess of the amounts mentioned in paragraph (b)(1) of this section.

(3) SBA reserves the authority to refuse to subordinate its claims if it determines, at the time you request your Debenture be purchased or guaranteed, that the exercise of reasonable investment prudence and your financial condition warrant such refusal.

§ 107.570 Restrictions on third-party debt of issuers of Participating Securities.

(a) *General.* Temporary Debt is the only debt (other than Leverage) that you are permitted to incur if you have applied to issue Participating Securities or if you have outstanding Participating Securities. For additional rules governing secured Temporary Debt, see § 107.550.

(b) *Definition of Temporary Debt.* Temporary Debt means your short-term borrowings if:

(1) Such borrowings are for the purpose of maintaining your operating liquidity or providing funds for a particular Financing of a Small Business;

(2) The funds are borrowed from a regulated financial institution or a reg-

ulated credit company (or, if approved by SBA on a case-by-case basis, from non-regulated lenders including shareholders or partners);

(3) Your total outstanding borrowings (not including Leverage) do not exceed 50 percent of your Leverageable Capital; and

(4) All such borrowings are fully paid off for at least 30 consecutive days during your fiscal year so that you have no outstanding third-party debt for 30 days.

VOLUNTARY DECREASE IN LICENSEE'S REGULATORY CAPITAL

§ 107.585 Voluntary decrease in Licensee's Regulatory Capital.

You must obtain SBA's prior written approval to reduce your Regulatory Capital by more than two percent in any fiscal year, unless otherwise permitted under §§ 107.1560 and 107.1570. At all times, you must retain sufficient Regulatory Capital to meet the minimum capital requirements in the Act and § 107.210, and sufficient Leverageable Capital to avoid having excess Leverage in violation of section 303 of the Act and §§ 107.1150 through 107.1170.

REQUIREMENT TO CONDUCT ACTIVE INVESTMENT OPERATIONS

§ 107.590 Licensee's requirement to maintain active operations.

(a) *Activity test.* You must conduct active operations, as determined under this § 107.590, as a condition of your license. You will be considered active if:

(1) During the eighteen months preceding your most recent fiscal year end, you made Financings totaling at least 20 percent of your Regulatory Capital; or

(2) Your idle funds did not exceed 20 percent of your total assets (at cost) at your most recent fiscal year end.

(b) *Permitted exceptions to activity requirements.* You are considered active if your failure to meet the requirements in paragraph (a) of this section is the result of one or more of the following factors:

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(1) Your excess idle funds are the result of the receipt, within the previous nine months, of realized gains, repayments, additional capital contributions, or Leverage.

(2) It is necessary for you to maintain excess idle funds to conduct your operations because:

(i) Your unfunded commitments from investors are no more than 20 percent of your Regulatory Capital; and

(ii) You cannot receive additional Leverage, solely because SBA has insufficient funds available.

(3) You have not made sufficient Financings because of a lack of available funds, evidenced by Loans and Investments (at cost) equal to at least 90 percent of your Combined Capital as of your most recent fiscal year end.

(4) You have not made sufficient Financings solely because SBA has restricted your ability to make investments.

(c) *Applicability of activity requirements.* The activity requirements in paragraph (a) of this section do not apply if you have filed a “Wind-up Plan” approved by SBA. “Wind-up Plan” means a plan that you prepare when you decide that you will no longer make any Financings other than follow-on investments, and that you update annually when you file your SBA Form 468. The plan must contain your best estimates of the following:

(1) The remaining number of years you expect to operate.

(2) For each of your Loans and Investments, the expected liquidation date and anticipated proceeds.

(3) The timing of your repayment of obligations to SBA.

(4) The timing and amount of any planned reductions in your Management Expenses.

(d) *Phase-in of activity requirements.*

(1) *General rule.* You must meet the activity requirements in this §107.590 as of the end of your first full fiscal year beginning after January 31, 1996. Until then, you will be considered active if you meet the activity requirements in effect on January 30, 1996.

(2) *Rule for new Licensees.* If you received your license after January 31, 1996, or if you received your license less than eighteen months before the fiscal

year end determined under paragraph (d)(1) of this section, you must meet the activity requirements in this §107.590 as of the end of your second full fiscal year beginning after the date you received your license.

Subpart F—Recordkeeping, Reporting, and Examination Requirements for Licensees

RECORDKEEPING REQUIREMENTS FOR LICENSEES

§ 107.600 General requirement for Licensee to maintain and preserve records.

(a) *Maintaining your accounting records.* You must establish and maintain your accounting records using SBA’s standard chart of accounts for Licensees, unless SBA approves otherwise.

(b) *Location of records.* You must keep the following records at your principal place of business or, in the case of paragraph (b)(3) of this section, at the branch office that is primarily responsible for the transaction:

(1) All your accounting and other financial records;

(2) All minutes of meetings of directors, stockholders, executive committees, partners, or other officials; and

(3) All documents and supporting materials related to your business transactions, except for any items held by a custodian under a written agreement between you and a Portfolio Concern or non-SBA lender, or any securities held in a safe deposit box, or by a licensed securities broker in an amount not exceeding the broker’s per-account insurance coverage.

(c) *Preservation of records.* You must retain all the records that are the basis for your financial reports. Such records must be preserved for the periods specified in this paragraph (c), and must remain accessible for the first two years of the preservation period.

(1) You must preserve for at least 15 years or, in the case of a Partnership Licensee, at least two years beyond the date of liquidation:

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(i) All your accounting ledgers and journals, and any other records of assets, asset valuations, liabilities, equity, income, and expenses.

(ii) Your Articles, bylaws, minute books, and license application.

(iii) All documents evidencing ownership of the Licensee including ownership ledgers, and ownership transfer registers.

(2) You must preserve for at least six years all supporting documentation (such as vouchers, bank statements, or canceled checks) for the records listed in paragraph (b)(1) of this section.

(3) After final disposition of any item in your Portfolio, you must preserve for at least six years:

(i) Financing applications and Financing instruments.

(ii) All loan, participation, and escrow agreements.

(iii) Size status declarations (SBA Form 480) and Financing Eligibility Statements (SBA Form 1941).

(iv) Any capital stock certificates and warrants of the Portfolio Concern that you did not surrender or exercise.

(v) All other documents and supporting material relating to the Portfolio Concern, including correspondence.

(4) You may substitute a microfilm or computer-scanned or generated copy for the original of any record covered by this paragraph (c).

(c) SBA Form 1941 (for Section 301(d) Licensees only), executed both by you and by the concern you are financing. By executing this document, both parties certify that the concern is a Disadvantaged Business.

(d) A certification by the concern you are financing of the intended use of the proceeds. For securities purchased from an underwriter in a public offering, you may substitute a prospectus indicating the intended use of proceeds.

(e) For each LMI Investment:

(1) A certification by the concern, dated as of the date of application for SBIC financing, as to the basis for its qualification as an LMI Enterprise,

(2) If the concern qualifies as an LMI Enterprise as defined in paragraph (2) of the definition of LMI Enterprise in § 107.50, an additional certification dated no later than the date 180 days after the closing of the LMI Investment, as to the location of the concern's employees or tangible assets or the principal residences of its full-time employees as of the date of such certification, and

(3) Certification(s) by the SBIC, made contemporaneously with the certification(s) of the concern, that the concern qualifies as an LMI Enterprise as of the date(s) of the concern's certification(s) and the basis for such qualification.

[61 FR 3189, Jan. 31, 1996, as amended at 64 FR 52646, Sept. 30, 1999]

§ 107.610 Required certifications for Loans and Investments.

For each of your Loans and Investments, you must have the documents listed in this section. You must keep these documents in your files and make them available to SBA upon request.

(a) SBA Form 480, the Size Status Declaration, executed both by you and by the concern you are financing. By executing this document, both parties certify that the concern is a Small Business. For securities purchased from an underwriter in a public offering, you may substitute a prospectus showing that the concern is a Small Business.

(b) SBA Form 652, a certification by the concern you are financing that it will not illegally discriminate (see part 112 of this chapter).

§ 107.620 Requirements to obtain information from Portfolio Concerns.

All the information required by this section is subject to the requirements of § 107.600 and must be in English.

(a) *Information for initial Financing decision.* Before extending any Financing, you must require the applicant to submit such financial statements, plans of operation (including intended use of financing proceeds), cash flow analyses and projections as are necessary to support your investment decision. The information submitted must be consistent with the size and type of the business and the amount of the proposed Financing.

(b) *Updated financial information.* (1) The terms of each Financing must require the Portfolio Concern to provide, at least annually, sufficient financial

information to enable you to perform the following required procedures:

- (i) Evaluate the financial condition of the Portfolio Concern for the purpose of valuing your investment;
- (ii) Determine the continued eligibility of the Portfolio Concern; and
- (iii) Verify the use of Financing proceeds.

(2) The information submitted to you must be certified by the president, chief executive officer, treasurer, chief financial officer, general partner, or proprietor of the Portfolio Concern.

(3) For financial and valuation purposes, you may accept a complete copy of the Federal income tax return filed by the Portfolio Concern (or its proprietor) in lieu of financial statements, but only if appropriate for the size and type of the business involved.

(4) The requirements in this paragraph (b) do not apply when you acquire securities from an underwriter in a public offering (see § 107.825). In that case, you must keep copies of all reports furnished by the Portfolio Concern to the holders of its securities.

(c) *Information required for examination purposes.* You must obtain any information requested by SBA's examiners for the purpose of verifying the certifications made by a Portfolio Concern under § 107.610. In this regard, your Financing documents must contain provisions requiring the Portfolio Concern to give you and/or SBA's examiners access to its books and records for such purpose.

REPORTING REQUIREMENTS FOR LICENSEES

§ 107.630 Requirement for Licensees to file financial statements with SBA (Form 468).

(a) *Annual filing of Form 468.* For each fiscal year, you must submit to SBA financial statements and supplementary information prepared on SBA Form 468. You must file Form 468 on or before the last day of the third month following the end of your fiscal year, except for the information required under paragraph (e) of this section, which must be filed on or before the last day of the fifth month following the end of your fiscal year.

(1) *Audit of Form 468.* The annual Form 468 must be audited by an independent public accountant acceptable to SBA.

(2) *Insurance requirement for public accountant.* Unless SBA approves otherwise, your independent public accountant must carry at least \$1,000,000 of Errors and Omissions insurance, or be self-insured and have a net worth of at least \$1,000,000.

(b) *Interim filings of Form 468.* When requested by SBA, you must file interim reports on Form 468. SBA may require you to file the entire form or only certain statements and schedules. You must file such reports on or before the last day of the month following the end of the reporting period. If you have an outstanding Leverage commitment from SBA, see the filing requirements in § 107.1220.

(c) *Standards for preparation of Form 468.* You must prepare SBA Form 468 in accordance with SBA's Accounting Standards and Financial Reporting Requirements for Small Business Investment Companies.

(d) *Where to file Form 468.* Submit all filings of Form 468 to the Investment Division of SBA.

(e) *Reporting of economic impact information on Form 468.* Your annual filing of SBA Form 468 must include an assessment of the economic impact of each Financing, specifying the full-time equivalent jobs created or retained, and the impact of the Financing on the revenues and profits of the business and on taxes paid by the business and its employees.

§ 107.640 Requirement to file Portfolio Financing Reports (SBA Form 1031).

For each Financing of a Small Business (excluding guarantees), you must submit a Portfolio Financing Report on SBA Form 1031 within 30 days of the closing date.

§ 107.650 Requirement to report portfolio valuations to SBA.

You must determine the value of your Loans and Investments in accordance with § 107.503. You must report such valuations to SBA within 90 days of the end of the fiscal year in the case of annual valuations, and within 30

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days following the close of other reporting periods. You must report material adverse changes in valuations at least quarterly, within thirty days following the close of the quarter.

§ 107.660 Other items required to be filed by Licensee with SBA.

(a) *Reports to owners.* You must give SBA a copy of any report you furnish to your investors, including any prospectus, letter, or other publication concerning your financial operations or those of any Portfolio Concern.

(b) *Documents filed with SEC.* You must give SBA a copy of any report, application or document you file with the Securities and Exchange Commission.

(c) *Litigation reports.* When you become a party to litigation or other proceedings, you must give SBA a report within 30 days that describes the proceedings and identifies the other parties involved and your relationship to them.

(1) The proceedings covered by this paragraph (c) include any action by you, or by your security holder(s) in a personal or derivative capacity, against an officer, director, Investment Adviser or other Associate of yours for alleged breach of official duty.

(2) SBA may require you to submit copies of the pleadings and other documents SBA may specify.

(3) Where proceedings have been terminated by settlement or final judgment, you must promptly advise SBA of the terms.

(4) This paragraph (c) does not apply to collection actions or proceedings to enforce your ordinary creditors' rights.

(d) *Notification of criminal charges.* If any officer, director, or general partner of the Licensee, or any other person who was required by SBA to complete a personal history statement in connection with your license, is charged with or convicted of any criminal offense other than a misdemeanor involving a minor motor vehicle violation, you must report the incident to SBA within 5 calendar days. Such report must fully describe the facts which pertain to the incident.

(e) *Other reports.* You must file any other reports that SBA may require by written directive.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5866, Feb. 5, 1998]

§ 107.670 Application for exemption from civil penalty for late filing of reports.

(a) If it is impracticable to submit any required report within the time allowed, you may apply for an extension. The request for an extension must:

(1) Be filed before the reporting deadline;

(2) Certify to an extraordinary occurrence, not within your control, that makes timely filing of the report impracticable; and

(3) Be accompanied by written evidence of such occurrence, where appropriate.

(b) Upon receipt of your request, SBA may exempt you from the civil penalty provision of section 315(a) of the Act, in such manner and under such conditions as SBA determines.

§ 107.680 Reporting changes in Licensee not subject to prior SBA approval.

(a) *Changes to be reported for post approval.* (1) This section applies to any changes in your Articles, ownership, capitalization, management, operating area, or investment policies that do not require SBA's prior approval. You must report such changes to SBA within 30 days for post approval. A processing fee of \$200 must accompany each request for post approval of new officers, directors, or Control Persons.

(2) *Exception for non-leveraged Licensees.* If you do not have outstanding Leverage or Earmarked Assets, you are not required to obtain post approval of new directors or new officers other than your chief operating officer; however, you must notify SBA of the new directors or officers within 30 days.

(b) *Approval by SBA.* You may consider any change submitted under this section § 107.680 to be approved unless SBA notifies you to the contrary within 90 days after receiving it. SBA's approval is contingent upon your full disclosure of all relevant facts and is subject to any conditions SBA may prescribe.

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any information in the accountant's working papers be made available to SBA upon request.

§ 107.690 Examinations.

SBA will examine all Licensees for the purpose of evaluating regulatory compliance.

§ 107.691 Responsibilities of Licensee during examination.

You must make all books, records and other pertinent documents and materials available for the examination, including any information required by the examiner under § 107.620(c). In addition, the agreement between you and the independent public accountant performing your audit must provide that

§ 107.692 Examination fees.

(a) *General.* SBA will assess fees for examinations in accordance with this § 107.692. Unless SBA determines otherwise on a case by case basis, SBA will not assess fees for special examinations to obtain specific information.

(b) *Base fee.* A base fee will be assessed based on your total assets (at cost) as of the date of your latest certified financial statement or a more recent interim statement requested by and submitted to SBA in connection with the examination. The base fee table is as follows:

| Total assets of licensee | Base fee | Plus, percent of assets |
|------------------------------------|----------|---|
| \$0 to \$1,500,000 | \$3,500 | +0% |
| \$1,500,001 to \$5,000,000 | 3,700 | +0.05% of the amount over \$1,500,000 |
| \$5,000,001 to \$10,000,000 | 6,000 | +0.02% of the amount over \$5,000,000 |
| \$10,000,001 to \$15,000,000 | 7,000 | +0.01% of the amount over \$10,000,000 |
| \$15,000,001 to \$25,000,000 | 7,700 | +0.015% of the amount over \$15,000,000 |
| \$25,000,001 to \$50,000,000 | 9,200 | +0.015% of the amount over \$25,000,000 |
| \$50,000,001 to \$60,000,000 | 13,000 | +0.01% of the amount over \$50,000,000 |
| \$60,000,001 and above | 14,000 | +0% |

(c) *Adjustments to base fee.* Your base fee, as determined by the table in paragraph (b) of this section, will be adjusted (increased or decreased) based on the following criteria:

(1) If you have no outstanding regulatory violations at the time of the commencement of the examination and SBA did not identify any violations as a result of the most recent prior examination, you will receive a 15% discount on your base fee;

(2) If you were fully responsive to the letter of notification of examination (that is, you provided all requested documents and information within the time period stipulated in the notification letter in a complete and accurate manner, and you prepared and had available all information requested by

the examiner for on-site review), you will receive a 10% discount on your base fee;

(3) If you are organized as a partnership or limited liability company, you will pay an additional charge equal to 5% of your base fee;

(4) If you are a Licensee authorized to issue Participating Securities, you will pay an additional charge equal to 10% of your base fee; and

(5) If you maintain your records/files in multiple locations (as permitted under § 107.600(b)), you will pay an additional charge equal to 10% of your base fee.

(d) *Fee discounts and additions table.* The following table summarizes the discounts and additions noted in paragraph (c) of this section:

| Examination fee discounts | Amount of discount— % of base examination fee | Examination fee additions | Amount of Addition— % of base examination fee |
|---------------------------|--|--|--|
| No prior violations | 15 | Partnership or limited liability company | 5 |
| Responsiveness | 10 | Participating Security Licensee | 10 |
| | | Records/files at multiple locations | 10 |

(e) *Delay fee.* If, in the judgement of SBA, the time required to complete your examination is delayed due to your lack of cooperation or the condition of your records, SBA may assess an additional fee of up to \$500 per day.

[62 FR 23338, Apr. 30, 1997]

Subpart G—Financing of Small Businesses by Licensees

DETERMINING THE ELIGIBILITY OF A SMALL BUSINESS FOR SBIC FINANCING

§ 107.700 Compliance with size standards in part 121 of this chapter as a condition of Assistance.

You are permitted to provide financial assistance and management services only to a Small Business. To determine whether an applicant is a Small Business, you may use either the financial size standards in § 121.301(c)(1) of this chapter or the industry standard covering the industry in which the applicant is primarily engaged, as set forth in § 121.301(c)(2) of this chapter.

§ 107.710 Requirement to finance smaller enterprises.

Your Portfolio must include Financings to Smaller Enterprises.

(a) *Definition of Smaller Enterprise.* A Smaller Enterprise means any small business concern that:

(1) Together with its Affiliates has a net worth of not more than \$6.0 million and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two years no greater than \$2.0 million; or

(2) Both together with its Affiliates, and by itself, meets the size standard of § 121.201 of this chapter at the time of Financing for the industry in which it is then primarily engaged.

(b) *Smaller Enterprise Financings.*—(1) *General rule.* At the close of each of your fiscal years, for all Financings you extended since April 25, 1994, excluding Financings made in whole or in part with Leverage in excess of \$90,000,000, at least 20 percent (in total dollars) must have been invested in Smaller Enterprises. If you were licensed after April 25, 1994, the 20 percent requirement applies to the

Financings you extended since you were licensed, excluding Financings made in whole or in part with Leverage in excess of \$90,000,000, plus any pre-licensing investments approved by SBA for inclusion in your Regulatory Capital. For purposes of this paragraph (b)(1), Leverage in excess of \$90,000,000 includes aggregate Leverage over \$90,000,000 issued by two or more Licensees under Common Control. See also paragraph (d) of this section.

(2) *Phase-in for new Licensees.* At the close of your first full fiscal year after licensing, at least 10 percent of the total dollar amount of the Financings you extended, including any pre-licensing investments approved by SBA for inclusion in your Regulatory Capital, must have been invested in Smaller Enterprises. At the close of each fiscal year thereafter, you must meet the requirement in paragraph (b)(1) of this section.

(c) *Special requirement for certain leveraged Licensees.*—(1) This paragraph (c) applies if you were licensed on or before September 30, 1996, and you issued Leverage after that date, and you have Regulatory Capital of:

(i) Less than \$10,000,000 if such Leverage included Participating Securities; or

(ii) Less than \$5,000,000 if such Leverage was Debentures only.

(2) At the close of each of your fiscal years, at least 50 percent of the total dollar amount of the Financings you extended after September 30, 1996 must have been invested in Smaller Enterprises.

(d) *Special requirement for Leverage over \$90,000,000.* If you have issued Leverage over \$90,000,000 (including aggregate Leverage over \$90,000,000 issued by two or more Licensees under Common Control), at the end of each of your fiscal years the cumulative Financings you extended to Smaller Enterprises must equal at least:

(1) The dollar amount necessary to satisfy paragraph (b) of this section; plus

(2) 100 percent of the amount of all Financings made in whole or in part with Leverage over \$90,000,000.

(e) Financing a change of ownership which results in the creation of a Smaller Enterprises. The Financing of

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a change of ownership under §107.750 which results in the creation of a Smaller Enterprise qualifies as a Smaller Enterprise Financing.

(f) *Non-compliance with this section.* If you have not reached the required percentage of Smaller Enterprise Financings at the end of any fiscal year, then you must be in compliance by the end of the following fiscal year. However, you will not be eligible for additional Leverage until you reach the required percentage (see §107.1120(c) through (e)).

[62 FR 11760, Mar. 13, 1997, as amended at 63 FR 5866, Feb. 5, 1998; 64 FR 70995, Dec. 20, 1999]

§ 107.720 Small Businesses that may be ineligible for financing.

(a) *Relenders or reinvestors.* You are not permitted to finance any business that is a relender or reinvestor.

(1) *Definition.* Relenders or reinvestors are businesses whose primary business activity involves, directly or indirectly, providing funds to others, purchasing debt obligations, factoring, or long-term leasing of equipment with no provision for maintenance or repair.

(2) *Exception.* You may provide Venture Capital Financing to Disadvantaged Businesses that are relenders or reinvestors (except banks or savings and loans not insured by agencies of the federal government, and agricultural credit companies). Without SBA's prior written approval, total Financings under this paragraph (a)(2) that are outstanding as of the close of your fiscal year must not exceed your Regulatory Capital.

(b) *Passive Businesses.* You are not permitted to finance a passive business.

(1) *Definition.* A business is passive if:

(i) It is not engaged in a regular and continuous business operation (for purposes of this paragraph (b), the mere receipt of payments such as dividends, rents, lease payments, or royalties is not considered a regular and continuous business operation); or

(ii) Its employees are not carrying on the majority of day to day operations, and the company does not provide effective control and supervision, on a day to day basis, over persons employed under contract; or

(iii) It passes through substantially all of the proceeds of the Financing to another entity.

(2) *Exception for pass-through of proceeds to subsidiary.* You may finance a passive business if it is a Small Business and it passes substantially all the proceeds through to one or more subsidiary companies, each of which is an eligible Small Business that is not passive. For the purpose of this paragraph (b)(2), "subsidiary company" means a company in which at least 50 percent of the outstanding voting securities are owned by the Financed passive business.

(3) *Exception for certain Partnership Licensees.* With the prior written approval of SBA, if you are a Partnership Licensee, you may form one or more wholly-owned corporations in accordance with this paragraph (b)(3). The sole purpose of such corporation(s) must be to provide Financing to one or more eligible, unincorporated Small Businesses. You may form such corporation(s) only if a direct Financing to such Small Businesses would cause any of your investors to incur unrelated business taxable income under section 511 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 511). Your ownership of such corporation(s) will not constitute a violation of §107.865(a) and your investment of funds in such corporation(s) will not constitute a violation of §107.730(a).

(c) *Real Estate Businesses.* (1) You are not permitted to finance any business classified under Major Group 65 (Real Estate) or Industry No. 1531 (Operative Builders) of the SIC Manual, with the following exceptions:

(i) Title Abstract companies (Industry No. 6541); and

(ii) Companies listed under Industry No. 6531 (for example, real estate agents, brokers, escrow agents, managers and multiple listing services) that derive at least 80 percent of their revenue from non-Affiliate sources.

(2) You are not permitted to finance a business, regardless of SIC classification, if the Financing is to be used to acquire or refinance real property, unless the Small Business:

(i) Is acquiring an existing property and will use at least 51 percent of the

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usable square footage for an eligible business purpose; or

(ii) Is building or renovating a building and will use at least 67 percent of the usable square footage for an eligible business purpose; or

(iii) Occupies the subject property and uses at least 67 percent of the usable square footage for an eligible business purpose.

(d) *Project Financing.* You are not permitted to finance a business if:

(1) The assets of the business are to be reduced or consumed, generally without replacement, as the life of the business progresses, and the nature of the business requires that a stream of cash payments be made to the business's financing sources, on a basis associated with the continuing sale of assets. Examples include real estate development projects and oil and gas wells; or

(2) The primary purpose of the Financing is to fund production of a single item or defined limited number of items, generally over a defined production period, and such production will constitute the majority of the activities of the Small Business. Examples include motion pictures and electric generating plants.

(e) *Farm land purchases.* You are not permitted to finance the acquisition of farm land. Farm land means land which is or is intended to be used for agricultural or forestry purposes, such as the production of food, fiber, or wood, or is so taxed or zoned.

(f) *Public interest.* You are not permitted to finance any business if the proceeds are to be used for purposes contrary to the public interest, including but not limited to activities which are in violation of law, or inconsistent with free competitive enterprise.

(g) *Foreign investment—(1) General rule.* You are not permitted to finance a business if:

(i) The funds will be used substantially for a foreign operation; or

(ii) At the time of the Financing or within one year thereafter, more than 49 percent of the employees or tangible assets of the Small Business are located outside the United States (unless you can show, to SBA's satisfaction, that the Financing was used for a specific domestic purpose).

(2) *Exception.* This paragraph (g) does not prohibit a Financing used to acquire foreign materials and equipment or foreign property rights for use or sale in the United States.

(h) *Associated supplier.* You are not permitted to finance a business that purchases, or will purchase, goods or services from a supplier who is your Associate, except under the following conditions:

(1) The amount of goods and services purchased (or to be purchased) from your Associate with the proceeds of the Financing, or with funds released as a result of the Financing, is less than 50 percent of the total amount of the Financing (75 percent for a Section 301(d) Licensee);

(2) The price of such goods and services is no higher than that charged other customers of your Associate; and

(3) The Small Business purchases no capital goods from your Associate.

(i) *Financing Licensees.* You are not permitted to provide funds, directly or indirectly, that the Small Business will use:

(1) To purchase stock in or provide capital to a Licensee; or

(2) To repay an indebtedness incurred for the purpose of investing in a Licensee.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5867, Feb. 5, 1998; 64 FR 70995, Dec. 20, 1999]

§ 107.730 Financings which constitute conflicts of interest.

(a) *General rule.* You must not self-deal to the prejudice of a Small Business, the Licensee, its shareholders or partners, or SBA. Unless you obtain a prior written exemption from SBA for special instances in which a Financing may further the purposes of the Act despite presenting a conflict of interest, you must not directly or indirectly:

(1) Provide Financing to any of your Associates.

(2) Provide Financing to an Associate of another Licensee if one of your Associates has received or will receive any direct or indirect Financing or a Commitment from that Licensee or a third Licensee (including Financing or Commitments received under any understanding, agreement, or cross dealing, reciprocal or circular arrangement).

- (3) Borrow money from:
- (i) A Small Business Financed by you;
 - (ii) An officer, director, or owner of at least a 10 percent equity interest in such business; or
 - (iii) A Close Relative of any such officer, director, or equity owner.
- (4) Provide Financing to a Small Business to discharge an obligation to your Associate or free other funds to pay such obligation. This paragraph (a)(4) does not apply if the obligation is to an Associate Lending Institution and is a line of credit or other obligation incurred in the normal course of business.
- (5) Provide Financing to a Small Business for the purpose of purchasing property from your Associate, except as permitted under § 107.720(h).
- (b) *Rules applicable to Associates.* Without SBA's prior written approval, your Associates must not, directly or indirectly:
- (1) Borrow money from any Person described in paragraph (a)(3) of this section.
 - (2) Receive from a Small Business any compensation in connection with Assistance you provide (except as permitted under §§ 107.825(c) and 107.900), or anything of value for procuring, attempting to procure, or influencing your action with respect to such Assistance.
 - (c) *Applicability of other laws.* You are also bound by any restrictions in Federal or State laws governing conflicts of interest and fiduciary obligations.
 - (d) *Financings with Associates—(1) Financings with Associates requiring prior approval.* Without SBA's prior written approval, you may not Finance any business in which your Associate has either a voting equity interest, or total equity interests (including potential interests), of at least five percent.
 - (2) *Other Financings with Associates.* If you and an Associate provide Financing to the same Small Business, either at the same time or at different times, you must be able to demonstrate to SBA's satisfaction that the terms and conditions are (or were) fair and equitable to you, taking into account any differences in the timing of each party's financing transactions.

(3) *Exceptions to paragraphs (d)(1) and (d)(2) of this section.* A Financing that falls into one of the following categories is exempt from the prior approval requirement in paragraph (d)(1) of this section or is presumed to be fair and equitable to you for the purposes of paragraph (d)(2) of this section, as appropriate:

- (i) Your Associate is a Lending Institution that is providing financing under a credit facility in order to meet the operational needs of the Small Business, and the terms of such financing are usual and customary.
- (ii) Your Associate invests in the Small Business on the same terms and conditions and at the same time as you.
- (iii) Both you and your Associate are leveraged Licensees, and both have outstanding Participating Securities or neither has outstanding Participating Securities.

(iv) You have no outstanding Leverage and do not intend to issue Leverage in the future, and your Associate either is not a Licensee or has no outstanding Leverage and does not intend to issue Leverage in the future.

(e) *Use of Associates to manage Portfolio Concerns.* To protect your investment, you may designate an Associate to serve as an officer, director, or other participant in the management of a Small Business. You must identify any such Associate in your records available for SBA's review under § 107.600. Without SBA's prior written approval, the Associate must not:

(1) Have any other direct or indirect financial interest in the Portfolio Concern that exceeds, or has the potential to exceed, 5 percent of the Portfolio Concern's equity.

(2) Have served for more than 30 days as an officer, director or other participant in the management of the Portfolio Concern before you provided Financing.

(3) Receive any income or anything of value from the Portfolio Concern unless it is for your benefit, with the exception of director's fees, expenses, and distributions based upon the Associate's ownership interest in the Concern.

(f) *1940 and 1980 Act Companies: SEC exemptions.* If you are a 1940 or 1980 Act

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Company and you receive an exemption from the Securities and Exchange Commission for a transaction described in this § 107.730, you need not obtain SBA's approval of the transaction. However, you must promptly notify SBA of the transaction and satisfy the public notice requirements in paragraph (g) of this section.

(g) *Public notice.* Before SBA grants an exemption under this § 107.730, you must publish notice of the transaction in a newspaper of general circulation in the locality most directly affected by the transaction, and furnish a certified copy to SBA within 10 days of publication. SBA will publish a similar notice in the FEDERAL REGISTER.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5867, Feb. 5, 1998; 64 FR 70996, Dec. 20, 1999]

§ 107.740 Portfolio diversification ("overline" limitation).

(a) *General rule.* This § 107.740 applies if you have outstanding Leverage or intend to issue Leverage in the future.

Without SBA's prior written approval, you may provide Financing or a Commitment to a Small Business only if the resulting amount of your aggregate outstanding Financings and Commitments to such Small Business and its Affiliates does not exceed:

(1) For a Section 301(c) Licensee, 20 percent of the sum of:

(i) Your Regulatory Capital as of the date of the Financing or Commitment; plus

(ii) Any Distribution(s) you made under § 107.1570(b), during the five years preceding the date of the Financing or Commitment, which reduced your Regulatory Capital; plus

(iii) Any Distribution(s) you made under § 107.585, during the five years preceding the date of the Financing or Commitment, which reduced your Regulatory Capital by no more than two percent or which SBA approves for inclusion in the sum determined in this paragraph (a)(1).

(2) For a Section 301(d) Licensee, 30 percent of a sum determined in the manner set forth in paragraph (a)(1)(i) through (iii) of this section.

(b) *Outstanding Financings.* For the purposes of paragraph (a) of this section, you must measure each out-

standing Financing at its current cost plus any amount of the Financing that was previously written off.

(c) *Adjustment to Regulatory Capital.* For the purposes of paragraph (a) of this section, you may compute a higher maximum permitted investment in a Small Business (an "increased limit") by adding "net unrealized gains" on Publicly Traded and Marketable securities to your Regulatory Capital, subject to the following conditions:

(1) "Net unrealized gains" on Publicly Traded and Marketable securities means unrealized gains on Publicly Traded and Marketable securities minus unrealized losses on *all* Loans and Investments.

(2) You must value your Publicly Traded and Marketable securities in accordance with your SBA-approved valuation policy.

(3) You must have positive Retained Earnings Available for Distribution at the time you compute an increased limit under this paragraph (c).

(4) At the time you first compute an increased limit, and as of the first business day of each calendar quarter that the increased limit is in effect, you must keep copies in your files of the NASDAQ listings (or the Wall Street Journal) or written quotations from the market makers quoting the Publicly Traded and Marketable securities which support the adjustment.

(5) If your net unrealized gains on Publicly Traded and Marketable securities are more than 30 percent below their original level on the first business day of any calendar quarter, and remain so for the next 30 days, you agree to do one of the following to remain in compliance with the terms of your Leverage:

(i) By the first day of the next calendar quarter, increase your Regulatory Capital sufficiently to restore support for the increased limit; or

(ii) Lower the increased limit to reflect the decrease in net unrealized gains on Publicly Traded and Marketable securities, and reduce any Financings that exceed the lower limit.

Example to paragraph (c) of this section. Your Regulatory Capital is \$2,500,000 and your overline limit is \$500,000 (20 percent of

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\$2,500,000). On January 15, 1995, you document net unrealized gains on Publicly Traded and Marketable securities of \$200,000 and compute an increased limit of \$540,000 (20 percent of \$2,700,000). You now make an investment of \$540,000 in a Small Business. Nothing changes until the first business day of April, 1996, when you document net unrealized gains on Publicly Traded and Marketable securities of only \$120,000, a reduction of more than 30 percent. Your net unrealized gains remain at this level for the next 30 days. Your increased limit is now only \$524,000 (20 percent of \$2,620,000). By July 1, 1996, you must either increase Regulatory Capital by \$80,000 to restore your increased limit to \$540,000, or reduce your portfolio investment from \$540,000 to \$524,000.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5867, Feb. 5, 1998; 64 FR 70996, Dec. 20, 1999]

§ 107.750 Conditions for financing a change of ownership of a Small Business.

You may finance a change of ownership of a Small Business only under the conditions set forth in this section.

(a) The Financing must:

(1) Promote the sound development or preserve the existence of the Small Business;

(2) Help create a Small Business as a result of a corporate divestiture; or

(3) Facilitate ownership in a Disadvantaged Business.

(b) The Resulting Concern (as defined in paragraph (c) of this section) must:

(1) Be a Small Business under § 107.700;

(2) Have 500 or fewer full-time equivalent employees; or meet one of the appropriate debt/equity ratio tests:

(i) If you have outstanding Leverage, the Resulting Concern's ratio of debt to equity must be no more than 5 to 1; or

(ii) If you have no outstanding Leverage, the Resulting Concern's ratio of debt to equity must be no more than 8 to 1.

(c) *Definitions.* (1) The "Resulting Concern" is determined by viewing the business as though the change of ownership had already occurred, giving effect to all contemplated financing, mergers, and acquisitions.

(2) For purposes of this section, "debt" means long-term debt, including contingent liabilities, but excluding accounts payable, operating leases,

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letters of credit, subordinated notes payable to the seller, any other liabilities approved for exclusion by SBA and short-term working capital loans (so long as the loans carry a zero balance for 30 consecutive days during the concern's fiscal year).

(3) For purposes of this section, "equity" means common and preferred stock (corporation), contributed capital (partnership), or membership interests (limited liability company).

§ 107.760 How a change in size or activity of a Portfolio Concern affects the Licensee and the Portfolio Concern.

(a) *Effect on Licensee of a change in size of a Portfolio Concern.* If a Portfolio Concern no longer qualifies as a Small Business you may keep your investment in the concern and:

(1) Subject to the overline limitations of § 107.740, you may provide additional Financing to the concern up to the time it makes a public offering of its securities.

(2) Even after the concern makes a public offering, you may exercise any stock options, warrants, or other rights to purchase Equity Securities which you acquired before the public offering, or fund Commitments you made before the public offering.

(b) *Effect of a change in business activity occurring within one year of Licensee's initial Financing—(1) Retention of Investment.* Unless you receive SBA's written approval, you may not keep your investment in a Portfolio Concern, small or otherwise, which becomes ineligible by reason of a change in its business activity within one year of your initial investment.

(2) *Request for SBA's approval to retain investment.* If you request that SBA approve the retention of your investment, your request must include sufficient evidence to demonstrate that the change in business activity was caused by an unforeseen change in circumstances and was not contemplated at the time the Financing was made.

(3) *Additional Financing.* If SBA approves your request to retain an investment under paragraph (b)(2) of this section, you may provide additional Financing to the Portfolio Concern to the extent necessary to protect against the

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loss of the amount of your original investment, subject to the overline limitations of §107.740.

(c) *Effect of a change in business activity occurring more than one year after the initial Financing.* If a Portfolio Concern becomes ineligible because of a change in business activity more than one year after your initial Financing you may:

- (1) Retain your investment; and
- (2) Provide additional Financing to the Portfolio Concern to the extent necessary to protect against the loss of the amount of your original investment, subject to the overline limitations of §107.740.

STRUCTURING LICENSEE'S FINANCING OF ELIGIBLE SMALL BUSINESSES: TYPES OF FINANCING

§ 107.800 **Financings in the form of Equity Securities.**

(a) You may purchase the Equity Securities of a Small Business. You may not, inadvertently or otherwise:

- (1) Become a general partner in any unincorporated business; or
- (2) Become jointly or severally liable for any obligations of an unincorporated business.

(b) *Definition.* Equity Securities means stock of any class in a corporation, stock options, warrants, limited partnership interests in a limited partnership, membership interests in a limited liability company, or joint venture interests. If the Financing agreement contains debt-type acceleration provisions or includes redemption provisions other than those permitted under §107.850, the security will be considered a Debt Security for purposes of §107.855.

§ 107.810 **Financings in the form of Loans.**

You may make Loans to Small Businesses. A Loan means a transaction evidenced by a debt instrument with no provision for you to acquire Equity Securities.

§ 107.815 **Financings in the form of Debt Securities.**

You may purchase Debt Securities from Small Businesses.

(a) *Definition.* Debt Securities are instruments evidencing a loan with an option or any other right to acquire Equity Securities in a Small Business or its Affiliates, or a loan which by its terms is convertible into an equity position. Consideration must be paid for all options that you acquire.

(b) *Restriction on options obtained by Licensee's management and employees.* If you have outstanding Leverage or plan to obtain Leverage, your employees, officers, directors or general partners, or the general partners of the management company that is providing services to you or to your general partner, may obtain options in a Financed Small Business only if:

- (1) They participate in the Financing on a pari passu basis with you; or
- (2) SBA gives its prior written approval; or
- (3) The options received are compensation for service as a member of the board of directors of the Small Business, and such compensation does not exceed that paid to other outside directors. In the absence of such directors, fees must be reasonable when compared with amounts paid to outside directors of similar companies.

§ 107.820 **Financings in the form of guarantees.**

At the request of a Small Business or where necessary to protect your existing investment, you may guarantee the monetary obligation of a Small Business to any non-Associate creditor.

(a) You may not issue a guaranty if:

- (1) You would become subject to State regulation as an insurance, guaranty or surety business;

(2) The amount of the guaranty plus any direct Financings to the Small Business exceed the overline limitations of §107.740, except that a pledge of the Equity Securities of the issuer or a subordination of your lien or creditor position does not count toward your overline; or

(3) The total financing cost to the Small Business exceeds the cost of money limits of §107.855.

(b) *Pledge of Licensee's assets as guaranty.* For purposes of this section, a guaranty with recourse only to specific asset(s) you have pledged is equal to the fair market value of such asset(s)

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or the amount of the debt guaranteed, whichever is less.

§ 107.825 Purchasing securities from an underwriter or other third party.

(a) *Securities purchased through or from an underwriter.* You may purchase the securities of a Small Business through or from an underwriter if:

(1) You purchase such securities within 90 days of the date the public offering is first made;

(2) Your purchase price is no more than the original public offering price; and

(3) The amount paid by you for the securities (less ordinary and reasonable underwriting charges and commissions) has been, or will be, paid to the Small Business, and the underwriter certifies in writing that this requirement has been met.

(b) *Recordkeeping requirements.* If you have outstanding Leverage or plan to obtain Leverage, you must keep records available for SBA's inspection which show the relevant details of the transaction, including, but not limited to, date, price, commissions, and the underwriter's certifications required under paragraph (c) of this section.

(c) *Underwriter's requirements.* If you have outstanding Leverage or plan to obtain Leverage, the underwriter must certify whether it is your Associate. You may pay reasonable and customary commissions and expenses to an Associate underwriter for the portion of an offering that you purchase, provided it is no more than 25 percent of the total offering. If you buy more than 25 percent of the offering, the amount you pay to the Associate underwriter must not exceed the total of the application and closing fees and reimbursable expenses permitted by § 107.860.

(d) *Securities purchased from another Licensee or from SBA.* You may purchase from, or exchange with, another Licensee, Portfolio securities (or any interest therein). Such purchase or exchange may only be made on a non-recourse basis. You may not have more than one-third of your total assets (valued at cost) invested in such securities. If you have previously sold Portfolio Securities (or any interest

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therein) on a recourse basis, you shall include the amount for which you may be contingently liable in your overline computation.

(e) *Purchases of securities from other non-issuers.* You may purchase securities of a Small Business from a non-issuer not previously described in this § 107.825 if:

(1) Such acquisition is a reasonably necessary part of the overall sound Financing of the Small Business under the Act; or

(2) The securities are acquired to finance a change of ownership under § 107.750.

STRUCTURING LICENSEE'S FINANCING OF AN ELIGIBLE SMALL BUSINESS: TERMS AND CONDITIONS OF FINANCING

§ 107.830 Minimum duration/term of financing.

(a) *General rule for Section 301(c) Licensees.* If you are a Section 301(c) Licensee, the duration/term of all your Financings must be for a minimum period of five years. *Exception:* You may finance a Disadvantaged Business for a minimum term of four years.

(b) *General rule for Section 301(d) Licensees.* The duration/term of your Financings may be for a minimum period of four years.

(c) *Restrictions on mandatory redemption of Equity Securities.* If you have acquired Equity Securities, options or warrants on terms that include redemption by the Small Business, you must not require redemption by the Small Business within the first five years of your acquisition except as permitted in § 107.850.

(d) *Special rules for Loans and Debt Securities.* (1) *Term.* The minimum term for Loans and Debt Securities starts with the first disbursement of the Financing.

(2) *Prepayment before five years.* You must permit voluntary prepayment of Loans and Debt Securities by the Small Business at any time during the initial five year term. You must obtain SBA's prior written approval of any restrictions on the ability of the Small Business to prepay other than the imposition of a reasonable prepayment

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penalty under paragraph (d)(3) of this section.

(3) *Prepayment penalties.* You may charge a reasonable prepayment penalty which must be agreed upon at the time of the Financing. If SBA determines that a prepayment penalty is unreasonable, you must refund the entire penalty to the Small Business. A prepayment penalty equal to 5 percent of the outstanding balance during the first year of any Financing, declining by one percentage point per year through the fifth year, is considered reasonable.

§ 107.835 Exceptions to minimum duration/term of Financing.

You may make a Short-term Financing for a term less than five years if the Financing is:

(a) An interim financing (for a period not to exceed one year) in contemplation of long-term Financing. The contemplated long-term Financing must be in an amount at least equal to the short-term Financing, and must be made by you alone or in participation with other investors; or

(b) For protection of your prior investment(s); or

(c) For the purpose of Financing a change of ownership under § 107.750. The total amount of such Financings may not exceed 20 percent of your Loans and Investments (at cost) at the end of any fiscal year; or

(d) An LMI Investment with a term of at least one year; or

(e) For the purpose of aiding a Small Business in performing a contract awarded under a Federal, State, or local government set-aside program for "minority" or "disadvantaged" contractors.

[61 FR 3189, Jan. 31, 1996, as amended at 64 FR 52646, Sept. 30, 1999]

§ 107.840 Maximum term of Financing.

The maximum term of any Loan or Debt Security Financing must be no longer than 20 years.

§ 107.845 Maximum rate of amortization on Loans and Debt Securities.

The principal of any Loan (or the loan portion of a Debt Security) with a term of five years or less cannot be amortized faster than straight line. If the

term is greater than five years, the principal cannot be amortized faster than straight line for the first five years.

§ 107.850 Restrictions on redemption of Equity Securities.

(a) A Portfolio Concern cannot be required to redeem Equity Securities earlier than five years (or one year in the case of an LMI Investment) from the date of the first closing unless:

(1) The concern makes a public offering, or has a change of management or control, or files for protection under the provisions of the Bankruptcy Code, or materially breaches your Financing agreement; or

(2) You make a follow-on investment, in which case the new securities may be redeemed in less than five years, but no earlier than the redemption date associated with your earliest Financing of the concern.

(b) The redemption price must be either:

(1) A fixed amount that is no higher than the price you paid for the securities; or

(2) An amount that cannot be fixed or determined before the time of redemption. In this case, the redemption price must be based on:

(i) A reasonable formula that reflects the performance of the concern (such as one based on earnings or book value); or

(ii) The fair market value of the concern at the time of redemption, as determined by a professional appraisal performed under an agreement acceptable to both parties.

(c) Any method for determining the redemption price must be agreed upon no later than the date of the first (or only) closing of the Financing.

[61 FR 3189, Jan. 31, 1996, as amended at 64 FR 52646, Sept. 30, 1999]

§ 107.855 Interest rate ceiling and limitations on fees charged to Small Businesses ("Cost of Money").

"Cost of Money" means the interest and other consideration that you receive from a Small Business. Subject to lower ceilings prescribed by local law, the Cost of Money to the Small Business must not exceed the ceiling determined under this section.

(a) *Financings to which the Cost of Money rules apply.* This section applies to all Loans and Debt Securities. As required by § 107.800(b), you must include as Debt Securities any equity interests with redemption provisions that do not meet the restrictions in § 107.850.

(b) *When to determine the Cost of Money ceiling for a Financing.* You may determine your Cost of Money ceiling for a particular Financing as of the date you issue a Commitment or as of the date of the first closing of the Financing. Once determined, the Cost of Money ceiling remains fixed for the duration of the Financing.

(c) *How to determine the Cost of Money ceiling for a Financing.* At a minimum, you may use a Cost of Money ceiling of 19 percent for a Loan and 14 percent for a Debt Security. To determine whether you may charge more, do the following:

(1) Choose a base rate for your Cost of Money computation. The base rate may be either the Debenture Rate currently in effect plus the applicable Charge determined under § 107.1130(d)(1), or your own “Cost of Capital” as determined under paragraph (d) of this section.

(2) For a Loan, add 11 percentage points to the base rate; for a Debt Security, add 6 percentage points. In either case, round the sum down to the nearest eighth of one percent.

(3) If the result is more than 19 percent (for a Loan) or 14 percent (for a Debt Security), you may use it as your Cost of Money ceiling.

(4) If two or more Licensees participate in the same Financing of a Small Business, the base rate used in this paragraph (c) is the highest of the following:

(i) The current Debenture Rate plus the applicable Charge determined under § 107.1130(d)(1);

(ii) The Cost of Capital of the lead Licensee; or

(iii) The weighted average of the Cost of Capital for all Licensees participating in the Financing.

(d) *How to determine your Cost of Capital.* “Cost of Capital” is an optional computation of the weighted average interest rate you pay on your “qualified borrowings”. “Qualified borrowings” means your Debentures together with your borrowings at or

below the usual interest rate charged by banks in your locality on the date your loan was made.

(1) For any fiscal year, you may compute your Cost of Capital:

(i) As of the first day of your fiscal year, to remain in effect for the entire year; or

(ii) As of the first day of every fiscal quarter during the fiscal year, to remain in effect for the duration of the quarter.

(2) For each qualified borrowing outstanding at your last fiscal year or fiscal quarter end, multiply the ending principal balance (net of related unamortized fees) by the number of days during the past four fiscal quarters that the borrowing was outstanding, and divide the result by 365.

(3) Add together the amounts computed for all borrowings under paragraph (d)(2) of this section. The result is your weighted average borrowings.

(4) For all qualified borrowings outstanding at your last fiscal year or fiscal quarter end, determine the aggregate interest expense for the past four fiscal quarters, excluding amortization of loan fees. For the purposes of this paragraph (d)(4):

(i) Interest expense on Debentures includes the 1 percent Charge paid by a Licensee under § 107.1130(d)(1); and

(ii) Section 301(d) Licensees with outstanding subsidized Debentures are presumed to have paid interest at the rate stated on the face of such Debentures, without regard to any subsidy paid by SBA.

(5) Divide the interest expense from paragraph (d)(4) of this section by the weighted average borrowings from paragraph (d)(3) of this section, and multiply by 100. The result is your Cost of Capital, which you may use to compute a Cost of Money ceiling under paragraph (c) of this section.

(e) *SBA review of Cost of Capital computation.* You must keep your Cost of Capital computations in a separate file available for SBA’s review.

(1) A computation that is kept in such a file and is audited by your independent public accountant is considered correct unless SBA demonstrates otherwise.

(2) If a computation is not kept in such a file or is unaudited, you must

prove its accuracy to SBA's satisfaction.

(f) *Charges included in the Cost of Money.* The Cost of Money includes all interest, points, discounts, fees, royalties, profit participation, and any other consideration you receive from a Small Business, except for the specific exclusions in paragraph (g) of this section. For equity interests subject to the Cost of Money rules (see paragraph (a) of this section), you must include:

(1) The portion of the fixed redemption price that exceeds your original cost.

(2) Any amount of a redemption that is paid out of accounts other than the Small Business's capital accounts (capital, paid-in surplus, or retained earnings of a corporation; or partners' capital of a partnership).

(g) *Charges excluded from the Cost of Money.* You may exclude from the Cost of Money:

(1) Discount on the loan portion of a Debt Security, if such discount exists solely as the result of the allocation of value to detachable stock purchase warrants in accordance with generally accepted accounting principles.

(2) Closing fees, application fees, and expense reimbursements, each as permitted under § 107.860.

(3) Reasonable prepayment penalties permitted under § 107.830(d)(3).

(4) Out-of-pocket conveyance and/or recordation fees and taxes.

(5) Reasonable closing costs.

(6) Fees for management services as permitted under § 107.900.

(7) Reasonable and necessary out-of-pocket expenses you incur to monitor the Financing.

(8) Board of director fees not in excess of those paid to other outside directors, if your board representation meets the requirements of § 107.730(e).

(9) A reasonable fee for arranging financing for a Small Business from a source that is neither a Licensee nor an Associate of yours. The Small Business must agree in writing to pay such a fee before you arrange the financing.

(10) A one-time "bonus" that satisfies the requirements in paragraph (i) of this section.

(11) The difference between the contractual interest rate of the Financing

and a default rate of interest permitted as follows:

(i) If a Small Business is in default, you may charge a default rate of interest as much as 7 percentage points higher than the contractual rate until the default is cured.

(ii) For this purpose, "default" means either failure to pay an amount when due or failure to provide information required under the Financing documents.

(12) Royalty payments received under any LMI Investment if the royalty is based on improvement in the performance of the Small Business after the date of the financing.

(h) *How to evaluate compliance with the Cost of Money ceiling.* You must determine whether a Financing is within the Cost of Money ceiling based on its discounted cash flows, as follows:

(1) Beginning with the date of the first disbursement ("period zero"), identify your cash inflows and cash outflows for each period of the Financing. The appropriate period to use (such as years, quarters, or months) depends on how you have structured the disbursements and payments.

(2) Discount the cash flows back to the first disbursement date using the Cost of Money ceiling from paragraph (d) of this section as the discount rate.

(3) If the result is zero or less, the Financing is within the Cost of Money ceiling; if it is greater than zero, the Financing exceeds the Cost of Money ceiling.

(i) *"Bonus" paid by a Small Business.* You may provide Financing to a Small Business that includes both a loan and a one-time "bonus" determined at the end of the loan term. For Cost of Money purposes, you must treat such a Financing as a Debt Security. You may exclude a bonus from the Cost of Money only if it is:

(1) Computed on or after the date that the Financing is repaid in full or was originally due to be repaid in full, whichever is earlier;

(2) Not fixed or determinable before the computation date; and

(3) Fully contingent upon factor(s) that reflect the performance of the Small Business. The period for which such performance is measured must not extend beyond the Small Business's

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fiscal year end immediately following repayment of the Financing. You must demonstrate to SBA's satisfaction that the factor(s) used are appropriate indicators of performance. Examples of generally acceptable factors include net income and operating cash flow; examples of generally unacceptable factors include gross revenues or gross margin.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5867, Feb. 5, 1998; 64 FR 52646, Sept. 30, 1999]

§ 107.860 Financing fees and expense reimbursements a Licensee may receive from a Small Business.

You may collect Financing fees and receive expense reimbursements from a Small Business only as permitted under this § 107.860.

(a) *Application fee.* You may collect a nonrefundable application fee from a Small Business to review its Financing application. The application fee may be collected at the same time as the closing fee under paragraph (c) or (d) of this section, or earlier. The fee must be:

(1) No more than 1 percent of the amount of Financing requested (or, if two or more Licensees participate in the Financing, their combined application fees are no more than 1 percent of the total Financing requested); and

(2) Agreed to in writing by the Financing applicant.

(b) *SBA review of application fees.* For any fiscal year, if the number of application fees you collect is more than twice the number of Financings closed, SBA in its sole discretion may determine that you are engaged in activities not contemplated by the Act, in violation of § 107.500.

(c) *Closing fee—Loans.* You may charge a closing fee on a Loan if:

(1) The fee is no more than 2 percent of the Financing amount (or, if two or more Licensees participate in the Financing, their combined closing fees are no more than 2 percent of the total Financing amount); and

(2) You charge the fee no earlier than the date of the first disbursement.

(d) *Closing fee—Debt or Equity Financings.* You may charge a Closing Fee on a Debt Security or Equity Security Financing if:

(1) The fee is no more than 4 percent of the Financing amount (or, if two or more Licensees participate in the Financing, their combined closing fees are no more than 4 percent of the total Financing amount); and

(2) You charge the fee no earlier than the date of the first disbursement.

(e) *Limitation on dual fees.* If another Licensee or an Associate of yours collects a transaction fee under § 107.900(e) in connection with your Financing of a Small Business, the sum of the transaction fee and your application and closing fees cannot exceed the maximum application and closing fees permitted under this § 107.860.

(f) *Expense reimbursements.* You may charge a Small Business for the reasonable out-of-pocket expenses, other than Management Expenses, that you incur to process its Financing application. If SBA determines that any of your reimbursed expenses are unreasonable or are Management Expenses, SBA will require you to include such amounts in the Cost of Money or refund them to the Small Business.

(g) *Breakup fee.* If a Small Business accepts your Commitment and then fails to close the Financing because it has accepted funds from another source, you may charge a "breakup fee" equal to the closing fee that you would have been permitted to charge under paragraph (c) or (d) of this section.

[61 FR 3189, Jan. 31, 1996; 61 FR 41496, Aug. 9, 1996]

§ 107.865 Restrictions on Control of a Small Business by a Licensee.

(a) *General.* You must not operate a business enterprise or function as a holding company exercising Control over a business enterprise. Neither you, nor you and your Associates, nor you and other Licensee(s) (in the latter two cases, the "Investor Group") may, except as set forth in this section, assume Control over a Small Business through management agreements, voting trusts, majority representation on the board of directors, or otherwise.

(b) *Presumption of Control.* Control over a Small Business will be presumed to exist whenever you or the Investor Group own or control, directly or indirectly:

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(1) At least 50 percent of the outstanding voting securities, if there are fewer than 50 shareholders; or

(2) More than 25 percent of the outstanding voting securities, if there are 50 or more shareholders; or

(3) A block of at least 20 percent of the outstanding voting securities, if there are 50 or more shareholders and no other party holds a larger block.

(c) *Rebuttals to presumption of Control.* A presumption of Control under paragraph (b) of this section is rebutted if:

(1) The management of the Small Business owns at least a 25 percent interest in the voting securities of the business; and

(2) The management of the Small Business can elect at least 40 percent of the board members of a corporation, general partners of a limited partnership, or managers of a limited liability company, as appropriate, and the Investor Group can elect no more than 40 percent. The balance of such officials may be elected through mutual agreement by management and the Investor Group.

(d) *Temporary Control permitted.* You may acquire temporary Control:

(1) Where reasonably necessary for the protection of your existing investment;

(2) If there has been a material breach of the Financing agreement by the Small Business;

(3) If there has been a substantial change in the Small Business's operations or products during the past 2 years, or such a change is the intended result of the Financing, and the Investor Group's Financing constitutes the Small Business's major source of capital;

(4) In the case of a Start-up Financing, if you or the Investor Group constitute the Small Business's major source of capital; or

(5) If your financing of the Small Business is an LMI Investment.

(e) *Control certification.* If you take temporary Control of a Small Business under paragraph (d) of this section, you must file a Control certification with SBA within 30 days. The certification must state:

(1) The date on which you took Control;

(2) The basis for taking Control; and

(3) Your agreement to relinquish Control within five years (although you may, under extraordinary circumstances, request SBA's approval of an extension beyond five years). In the case of an LMI Investment with a term of less than five years, you must agree to relinquish Control within the term of the financing.

(f) *Control acquired through enforcement actions.* If you retain or acquire Control through enforcement action, you must notify SBA immediately and submit a Control certification within 30 days.

(g) *Additional Financing for businesses under Licensee's Control.* If you assume Control of a Small Business, you may later provide additional Financing, without an exemption under § 107.730(a)(1).

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5867, Feb. 5, 1998; 64 FR 52646, Sept. 30, 1999]

§ 107.880 Assets acquired in liquidation of Portfolio securities.

You may acquire assets in full or partial liquidation of a Small Business's obligation to you under the conditions permitted by this § 107.880. The assets may be acquired from the Small Business, a guarantor of its obligation, or another party.

(a) *Timely disposition of assets.* You must dispose of assets acquired in liquidation of a Portfolio security within a reasonable period of time.

(b) *Permitted expenditures to preserve assets.* (1) You may incur reasonably necessary expenditures to maintain and preserve assets acquired.

(2) You may incur reasonably necessary expenditures for improvements to render such assets saleable.

(3) You may make payments of mortgage principal and interest (including amounts in arrears when you acquired the asset), pay taxes when due, and pay for necessary insurance coverage.

(c) *SBA approval of expenditures.* This paragraph (c) applies if you have outstanding Leverage or are applying for Leverage. Any application for SBA approval under this paragraph must specify all expenses estimated to be necessary pending disposal of the assets. Without SBA's prior written approval:

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(1) Your total expenditures under paragraphs (b)(1) and (b)(2) of this section plus your total Financing(s) to the Small Business must not exceed your overline limit under § 107.740; and

(2) Your total expenditures under paragraph (b) of this section plus your total Financing(s) to the Small Business must not exceed 35 percent of your Regulatory Capital.

LIMITATIONS ON DISPOSITION OF ASSETS

§ 107.885 **Disposition of assets to Licensee's Associates or to competitors of Portfolio Concern.**

(a) *Sale of assets to Associate.* Except with SBA's prior written approval, you are not permitted to dispose of assets (including assets acquired in liquidation) to any Associate if you have outstanding Leverage or Earmarked Assets. As a prerequisite to such approval, you must demonstrate that the proposed terms of disposal are at least as favorable to you as the terms obtainable elsewhere.

(b) *Sale of assets to competitor of Small Business.* Except with the prior written approval of the Portfolio Concern (if it is not under your Control) or of SBA, you are not permitted to dispose of Portfolio securities to a competitor of such concern. If SBA's prior approval is not required, you must promptly notify SBA of any such disposal.

MANAGEMENT SERVICES AND FEES

§ 107.900 **Management fees for services provided to a Small Business by Licensee or its Associate.**

This § 107.900 applies to management services that you or your Associate provide to a Small Business during the term of a Financing or prior to Financing. It does not apply to management services that you or your Associate provide to a Small Business that you do not finance. Fees permitted under this section are not included in the Cost of Money (see § 107.855).

(a) *Permitted management fees.* You or your Associate may provide management services to a Small Business financed by you if:

(1) You or your Associate have entered into a written contract with the Small Business;

(2) The fees charged are for services actually performed;

(3) Services are provided on an hourly fee, project fee, or other reasonable basis; and

(4) You can demonstrate to SBA, upon request, that the rate does not exceed the prevailing rate charged for comparable services by other organizations in the geographic area of the Small Business.

(b) *Fees for service as a board member.* You or your Associate may receive fees in the form of cash, warrants, or other payments, for services provided as members of the board of directors of a Small Businesses Financed by you. The fees must not exceed those paid to other outside board members. In the absence of such board members, fees must be reasonable when compared with amounts paid to outside directors of similar companies.

(c) *SBA approval required.* You must obtain SBA's prior written approval of any management contract that does not satisfy paragraphs (a) or (b) of this section.

(d) *Recordkeeping requirements.* You must keep a record of hours spent and amounts charged to the Small Business, including expenses charged.

(e) *Transaction fees.* (1) You may charge reasonable transaction fees for work you or your Associate perform to prepare a client for a public offering, private offering, or sale of all or part of the business, and for assisting with the transaction. Compensation may be in the form of cash, notes, stock, and/or options.

(2) Your Associate may charge market rate investment banking fees to a Small Business on that portion of a Financing that you do not provide.

Subpart H—Non-leveraged Licensees—Exceptions to Regulations

§ 107.1000 **Licensees without Leverage—exceptions to the regulations.**

The regulatory exceptions in this section apply to Licensees with no outstanding Leverage or Earmarked Assets.

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(a) You are exempt from the following provisions (but you must come into compliance with them to become eligible for Leverage):

(1) The overline limitation in § 107.740.

(2) The restrictions in § 107.530 on investments of idle funds, provided you do not engage in activities not contemplated by the Act.

(3) The restrictions in § 107.550 on third-party debt.

(4) The restrictions in § 107.880 on expenses incurred to maintain or improve assets acquired in liquidation of Portfolio securities.

(5) The recordkeeping requirements and fee limitations in § 107.825 (b) and (c), respectively, for securities purchased through or from an underwriter.

(b) You are exempt from the requirements to obtain SBA's prior approval for:

(1) A decrease in your Regulatory Capital of more than two percent under § 107.585 (but not below the minimum required under the Act or these regulations). You must report the reduction to SBA within 30 days.

(2) Disposition of any asset to your Associate under § 107.885.

(3) A contract to employ an Investment Adviser/Manager under § 107.510. However, you must notify SBA of the Management Expenses to be incurred under such contract, or of any subsequent material changes in such Management Expenses, within 30 days of execution. In order to become eligible for Leverage, you must have the contract approved by SBA.

(4) Your initial Management Expenses under § 107.140 and increases in your Management Expenses under § 107.520. However, you must have your Management Expenses approved by SBA in order to become eligible for Leverage.

(5) Options obtained from a Small Business by your management or employees under § 107.815(b).

(c) You are exempt from the requirement in § 107.680 to obtain SBA's post approval of new directors and new officers, other than your chief operating officer. However, you must notify SBA of the new directors or officers within 30 days, and you must have all direc-

tors and officers approved by SBA in order to become eligible for Leverage.

Subpart I—SBA Financial Assistance for Licensees (Leverage)

GENERAL INFORMATION ABOUT OBTAINING LEVERAGE

§ 107.1100 Types of Leverage and application procedures.

(a) *Types of Leverageable available.* You may apply for Leverage from SBA in one or both of the following forms:

(1) The purchase or guarantee of your Debentures.

(2) The purchase or guarantee of your Participating Securities.

(b) *Applying for Leverage.* The Leverage application process has two parts. You must first apply for SBA's conditional commitment to reserve a specific amount of Leverage for your future use. You may then apply to draw down Leverage against the commitment. See §§ 107.1200 through 107.1240.

(c) *Where to send your application.* Send all Leverage applications to SBA, Investment Division, 409 Third Street, S.W., Washington, DC 20416.

[63 FR 5868, Feb. 5, 1998, as amended at 64 FR 70996, Dec. 20, 1999]

§ 107.1120 General eligibility requirements for Leverage.

To be eligible for Leverage, you must:

(a) Demonstrate a need for Leverage, evidenced by your investment activity and a lack of sufficient funds for investment. For your first issuance of Leverage, if you have invested at least 50 percent of your Leverageable Capital, you are presumed to lack sufficient funds for investment.

(b) Have adequate Private Capital to satisfy the requirements for financial viability under § 107.200.

(c) Meet the minimum capital requirements of § 107.210, subject to the following additional conditions:

(1) If you were licensed after September 30, 1996 under the exception in § 107.210(a)(1), you will not be eligible for Leverage until you have Regulatory Capital of at least \$5,000,000.

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(2) If you were licensed on or before September 30, 1996, and have Regulatory Capital of less than \$5,000,000 (less than \$10,000,000 if you wish to issue Participating Securities):

(i) You must certify in writing that at least 50 percent of the aggregate dollar amount of your Financings extended after September 30, 1996 will be provided to Smaller Enterprises (as defined in § 107.710(a)); and

(ii) You must demonstrate to SBA's satisfaction that the approval of Leverage will not create or contribute to an unreasonable risk of default or loss to the United States government, based on such measurements of profitability and financial viability as SBA deems appropriate.

(d) Certify, if applicable, that you will satisfy the requirement in § 107.710(d) to provide Financing to Smaller Enterprises.

(e) Certify in writing that you are in compliance with the requirement to finance Smaller Enterprises in § 107.710(b).

(f) Show, to the satisfaction of SBA, that your management is qualified and has the knowledge, experience, and capability necessary for investing in the types of businesses contemplated by the Act, the regulations in this part and your business plan.

(g) Be in compliance with the regulations in this part.

(h) If required by SBA, have your Control Person(s) assume, in writing, personal responsibility for your Leverage, effective only if such Control Person(s) participate (directly or indirectly) in a transfer of Control not approved by SBA.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998; 64 FR 70996, Dec. 20, 1999]

§ 107.1130 Leverage fees and additional charges payable by Licensee.

(a) *Leverage fee.* You must pay a leverage fee to SBA for each issuance of a Debenture or Participating Security. The fee is 3 percent of the face amount of the Leverage issued.

(b) *Payment of leverage fee.* (1) If you issue a Debenture or Participating Security to repay or redeem existing Leverage, you must pay the leverage fee

before SBA will guarantee or purchase the new Leverage security.

(2) If you issue a Debenture or Participating Security that is not used to repay or redeem existing Leverage, SBA will deduct the leverage fee from the proceeds remitted to you, unless you prepaid the fee under § 107.1210.

(c) *Refundability.* The leverage fee is not refundable under any circumstances.

(d) *Additional charge for Leverage.*—(1) *Debentures.* You must pay to SBA a Charge of 1 percent per annum on the outstanding amount of your Debentures issued on or after October 1, 1996, payable under the same terms and conditions as the interest on the Debentures. This Charge does not apply to Debentures issued pursuant to a Leverage commitment obtained from SBA on or before September 30, 1996.

(2) *Participating Securities.* You must pay to SBA a Charge of 1 percent per annum on the outstanding amount of your Participating Securities issued on or after October 1, 1996, payable under the same terms and conditions as the Prioritized Payments on the Participating Securities. This Charge does not apply to Participating Securities issued pursuant to a Leverage commitment obtained from SBA on or before September 30, 1996.

(e) *Other Leverage fees.* SBA may establish a fee structure for services performed by the CRA. SBA will not collect any fee for its guarantee of TCs.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998]

§ 107.1140 Licensee's acceptance of SBA remedies under §§ 107.1800 through 107.1820.

If you issue Leverage after April 25, 1994, you automatically agree to the terms and conditions in §§ 107.1800 through 107.1820 as they exist at the time of issuance. The effect of these terms and conditions is the same as if they were fully incorporated in the terms of your Leverage.

MAXIMUM AMOUNT OF LEVERAGE FOR
WHICH A LICENSEE IS ELIGIBLE

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§ 107.1150 Maximum amount of Leverage for a Section 301(c) Licensee.

(a) *Maximum amount of Leverage.* (1) *Amounts before indexing.* If you are a Section 301(c) Licensee, the following table shows the maximum amount of Leverage you may have outstanding at any time, subject to the indexing adjustment set forth in paragraph (a)(2) of this section:

| If your leverageable capital is: | Then your maximum leverage is: |
|--|--|
| (1) Not over \$17,500,000 | 300 percent of Leverageable Capital |
| (2) Over \$17,500,000 but not over \$35,100,000. | $\$52,500,000 + [2 \times (\text{Leverageable Capital} - \$17,500,000)]$ |
| (3) Over \$35,100,000 but not over \$52,600,000. | $\$87,700,000 + (\text{Leverageable Capital} - \$35,100,000)$ |
| (4) Over \$52,600,000 | \$105,200,000 |

(2) *Indexing of maximum amount of Leverage.* SBA will adjust the amounts in paragraph (a) of this section annually to reflect increases through September in the Consumer Price Index published by the Bureau of Labor Statistics. SBA will publish the indexed maximum Leverage amounts each year in a Notice in the FEDERAL REGISTER.

(b) *Exceptions to maximum Leverage provisions.* (1) *Licensees under Common Control.* Two or more Licensees under Common Control may have aggregate outstanding Leverage over \$105,200,000 (subject to indexing as set forth in paragraph (a)(2) of this section) only if SBA gives them permission to do so. SBA may grant such permission on a case-by-case basis only. SBA may impose any terms and conditions SBA considers appropriate to minimize its risk of loss in the event of default.

(2) *Licensees with excess Leverage issued before March 31, 1993.* If you had outstanding Debentures on March 31, 1993 that exceeded 300 percent of your Leverageable Capital:

(i) You do not have to prepay the excess amount.

(ii) You may apply for an additional Debenture guarantee or Participating Security guarantee if you use the proceeds solely to pay the amount due at maturity on a Debenture issued before March 31, 1993. The new Debenture or Participating Security must mature on or before September 30, 2002.

(iii) You must maintain at least 65 percent of your "Total Funds Available

for Investment" in "Venture Capital Financings" (as defined in § 107.1160(e) and (f), respectively) until your outstanding Debentures no longer exceed 300 percent of your Leverageable Capital.

(3) *Maximum amount of Participating Securities.* See § 107.1170.

[61 FR 3189, Jan. 31, 1996, as amended at 64 FR 70996, Dec. 20, 1999]

§ 107.1160 Maximum amount of Leverage for a Section 301(d) Licensee.

This section applies to Leverage issued by a Section 301(d) Licensee on or before September 30, 1996. Effective October 1, 1996, a Section 301(d) Licensee may apply to issue new Leverage, or refinance existing Leverage, only on the same terms permitted under § 107.1150.

(a) *Maximum amount of subsidized Leverage.* (1) "Subsidized Leverage" means Debentures with a reduced interest rate and Preferred Securities. If you are a Section 301(d) Licensee:

(i) The maximum amount of subsidized Leverage you may have outstanding at any time is the lesser of 400 percent of your Leverageable Capital, or \$35,000,000. The same limit applies to a group of Section 301(d) Licensees under Common Control.

(ii) The maximum amount of Preferred Securities you may have outstanding at any time is 200 percent of your Leverageable Capital.

(2) Certain types and amounts of subsidized Leverage have special eligibility requirements (see paragraphs (c) and (d) of this section).

(b) *Maximum amount of total Leverage.* Use § 107.1150 (a) and (b)(1) to determine your maximum amount of Leverage as if you were a Section 301(c) Licensee. If the result is more than your maximum subsidized Leverage, then this is your maximum total (subsidized plus non-subsidized) Leverage. Otherwise, your maximum total Leverage is the same as your maximum subsidized Leverage. For Participating Securities, see § 107.1170.

(c) *Special eligibility requirements for fourth tier of Leverage.* A "fourth tier of Leverage" is any amount of outstanding Leverage in excess of 300 percent of your Leverageable Capital.

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(1) To qualify for a fourth tier of Leverage, you must have invested (or have Commitments to invest) at least 30 percent of your “Total Funds Available for Investment” in “Venture Capital Financings” (see the definitions in paragraphs (e) and (f) of this section).

(2) While you have a fourth tier of Leverage, you must maintain Venture Capital Financings (at cost) that equal at least 30 percent of your Total Funds Available for Investment.

(d) *Special eligibility requirements for second tier of Preferred Securities.* A “second tier of Preferred Securities” is any amount of outstanding Preferred Securities in excess of 100 percent of your Leverageable Capital.

(1) To qualify for a second tier of Preferred Securities:

(i) If your license was issued after October 13, 1971, you must have at least \$500,000 of Leverageable Capital.

(ii) You must have invested (or have Commitments to invest) at least the same dollar amount in Venture Capital Financings.

(2) While you have a second tier of Preferred Securities, you must maintain at least the same dollar amount of Venture Capital Financings (at cost).

(e) *Definition of “Total Funds Available for Investment”.* Total Funds Available for Investment means the result obtained from the following formula:

$$T = .90 \times (CA + LI)$$

Where:

T = Total funds available for investment

CA = Total current assets

LI = Total Loans and Investment at cost (as reported on SBA Form 468), net of current maturities

(f) *Definition of “Venture Capital Financing”.* Venture Capital Financing means an investment represented by common or preferred stock, a limited partnership interest, or a similar ownership interest; or by an unsecured debt instrument that is subordinated by its terms to all other borrowings of the issuer.

(1) A debt secured by any agreement with a third party is not a Venture Capital Financing, whether or not you have a security interest in any asset of the third party or have recourse against the third party.

(2) A Financing that originally qualified as a Venture Capital Financing will continue to qualify (at its original cost), even if you later must report it on SBA Form 468 under either Assets Acquired in Liquidation of Portfolio Securities or Operating Concerns Acquired.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998]

§ 107.1170 Maximum amount of Participating Securities for any Licensee.

The maximum amount of Participating Securities you may have outstanding at any time is 200 percent of your Leverageable Capital. If you are a Section 301(d) Licensee, the maximum combined amount of Participating Securities and Preferred Securities you may have outstanding at any time is 200 percent of your Leverageable Capital.

CONDITIONAL COMMITMENTS BY SBA TO RESERVE LEVERAGE FOR A LICENSEE

§ 107.1200 SBA's Leverage commitment to a Licensee—application procedure, amount, and term.

(a) *General.* Under the provisions in §§ 107.1200 through 107.1240, you may apply for SBA's conditional commitment to reserve a specific amount and type of Leverage for your future use. You may then apply to draw down Leverage against the commitment.

(b) *Applying for a Leverage commitment.* SBA will notify you when it is accepting requests for Leverage commitments. Upon receipt of your request, SBA will send you a complete application package.

(c) *Limitations on the amount of a Leverage commitment.* The amount of a Leverage commitment must be a multiple of \$5,000.

(d) *Term of Leverage commitment.* SBA's Leverage commitment will automatically lapse on the expiration date stated in the commitment letter issued to you by SBA.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998]

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§ 107.1210 Payment of leverage fee upon receipt of commitment.

(a) *Partial prepayment of leverage fee.* As a condition of SBA's Leverage commitment, and before you draw any Leverage under such commitment, you must pay to SBA a non-refundable fee equal to 1 percent of the face amount of the Debentures or Participating Securities reserved under the commitment. This amount represents a partial prepayment of the 3 percent leverage fee established under § 107.1130(a).

(b) *Automatic cancellation of commitment.* Unless you pay the fee required under paragraph (a) of this section by 5:00 P.M. Eastern Time on the 30th calendar day following the issuance of SBA's Leverage commitment, the commitment will be automatically canceled.

[63 FR 5868, Feb. 5, 1998]

§ 107.1220 Requirement for Licensee to file quarterly financial statements.

As long as any part of SBA's Leverage commitment is outstanding, you must give SBA a Financial Statement on SBA Form 468 (Short Form) as of the close of each quarter of your fiscal year (other than the fourth quarter, which is covered by your annual filing of Form 468 under § 107.630(a)). You must file this form within 30 days after the close of the quarter. You will not be eligible for a draw if you are not in compliance with this § 107.1220.

[64 FR 70996, Dec. 20, 1999]

§ 107.1230 Draw-downs by Licensee under SBA's Leverage commitment.

(a) *Licensee's authorization of SBA to purchase or guarantee securities.* By submitting a request for a draw against SBA's Leverage commitment, you authorize SBA, or any agent or trustee SBA designates, to guarantee your Debenture or Participating Security and to sell it with SBA's guarantee.

(b) *Limitations on amount of draw.* The amount of a draw must be a multiple of \$5,000. SBA, in its discretion, may determine a minimum dollar amount for draws against SBA's Leverage commitments. Any such minimum amounts will be published in Notices in the FEDERAL REGISTER from time to time.

(c) *Effect of regulatory violations on Licensee's eligibility for draws—(1) General rule.* You are eligible to make a draw against SBA's Leverage commitment only if you are in compliance with all applicable provisions of the Act and SBA regulations (i.e., no unresolved statutory or regulatory violations).

(2) *Exception to general rule.* If you are not in compliance, you may still be eligible for draws if:

(i) SBA determines that your outstanding violations are of non-substantive provisions of the Act or regulations and that you have not repeatedly violated any non-substantive provisions; or

(ii) You have agreed with SBA on a course of action to resolve your violations and such agreement does not prevent you from issuing Leverage.

(d) *Procedures for funding draws.* You may request a draw at any time during the term of the commitment. With each request, submit the following documentation:

(1) A statement certifying that there has been no material adverse change in your financial condition since your last filing of SBA Form 468 (see also § 107.1220 for SBA Form 468 filing requirements).

(2) If your request is submitted more than 30 days following the end of your fiscal year, but before you have submitted your annual filing of SBA Form 468 (Long Form) in accordance with § 107.630(a), a preliminary unaudited annual financial statement on SBA Form 468 (Short Form).

(3) A statement certifying that to the best of your knowledge and belief, you are in compliance with all provisions of the Act and SBA regulations (i.e., no unresolved regulatory or statutory violations), or a statement listing any specific violations you are aware of. Either statement must be executed by one of the following:

(i) An officer of the Licensee;
(ii) An officer of a corporate general partner of the Licensee; or
(iii) An individual who is authorized to act as or for a general partner of the Licensee.

(4) A statement that the proceeds are needed to fund one or more particular Small Businesses or to provide liquidity for your operations. If required by

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SBA, the statement must include the name and address of each Small Business, and the amount and anticipated closing date of each proposed Financing.

(e) *Reporting requirements after drawing funds.* (1) Within 30 calendar days after the actual closing date of each Financing funded with the proceeds of your draw, you must file an SBA Form 1031 confirming the closing of the transaction.

(2) If SBA required you to provide information concerning a specific planned Financing under paragraph (d)(3) of this section, and such Financing has not closed within 60 calendar days after the anticipated closing date, you must give SBA a written explanation of the failure to close.

(3) If you do not comply with this paragraph (e), you will not be eligible for additional draws. SBA may also determine that you are not in compliance with the terms of your Leverage under §§ 107.1810 or 107.1820.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998; 64 FR 70996, Dec. 20, 1999]

§ 107.1240 Funding of Licensee's draw request through sale to short-term investor.

(a) *Licensee's authorization of SBA to arrange sale of securities to short-term investor.* By submitting a request for a draw of Debenture or Participating Security Leverage, you authorize SBA, or any agent or trustee SBA designates, to enter into any agreements (and to bind you to such agreements) necessary to accomplish:

(1) The sale of your Debenture or Participating Security to a short-term investor at a rate that may be different from the Trust Certificate Rate which will be established at the time of the pooling of your security;

(2) The purchase of your security from the short-term investor, either by you or on your behalf; and

(3) The pooling of your security with other securities with the same maturity date.

(b) *Sale of Debentures to a short-term investor.* If SBA sells your Debenture to a short-term investor:

(1) The sale price will be the face amount.

(2) At the next scheduled date for the sale of Debenture Trust Certificates, whether or not the sale actually occurs, you must pay interest to the short-term investor for the short-term period. If the actual sale of Trust Certificates takes place after the scheduled date, you must pay the short-term investor interest from the scheduled sale date to the actual sale date. This additional interest is due on the actual sale date.

(3) Failure to pay the interest constitutes noncompliance with the terms of your Leverage (see § 107.1810).

(c) *Sale of Participating Securities to a short-term investor.* If SBA sells your Participating Security to a short-term investor, the sale price will be the face amount.

(d) *Licensee's right to repurchase its Debentures before pooling.* You may repurchase your Debentures from the short-term investor before they are pooled. To do so, you must:

(1) Give SBA written notice at least 10 days before the cut-off date for the pool in which your Debenture is to be included; and

(2) Pay the face amount of the Debenture, plus interest, to the short-term investor.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998]

PREFERRED SECURITIES LEVERAGE— SECTION 301(D) LICENSEES

§ 107.1400 Dividends or partnership distributions on 4 percent Preferred Securities.

If you issued Preferred Securities to SBA on or after November 21, 1989, you must pay SBA a dividend or partnership distribution of 4 percent per year, from the date you issued Preferred Securities to the date you repay them, both inclusive. The dividend or partnership distribution is:

(a) Computed on the par value of the outstanding stock or the face value of the outstanding limited partnership interest.

(b) Cumulative. This means that if you do not pay the entire dividend or partnership distribution for a given fiscal year, the unpaid balance accumulates as a distribution in arrears. You

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do not have to pay interest on distributions in arrears.

(c) Preferred. This means that you must pay SBA in full (including distributions in arrears) before setting aside or paying any amount to any other equity holder.

(d) Payable at the discretion of your Board of Directors or General Partner(s), except that all distributions in arrears must be paid in full when you redeem the Preferred Securities.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5869, Feb. 5, 1998]

§ 107.1410 Requirement to redeem 4 percent Preferred Securities.

You must redeem 4 percent Preferred Securities not later than 15 years from the date of issuance. At the redemption date, you must pay to SBA:

(a) The par value (of preferred stock) or face value (of a preferred limited partnership interest); plus

(b) Any unpaid dividends or partnership distributions accrued to the redemption date.

§ 107.1420 Articles requirements for 4 percent Preferred Securities.

If you have outstanding 4 percent Preferred Securities, your Articles must contain all the provisions in §§ 107.1400 and 107.1410.

[63 FR 5869, Feb. 5, 1998]

§ 107.1430 Redeeming 4 percent Preferred Securities with proceeds of non-subsidized Debentures.

If SBA approves, a Section 301(d) Licensee may use the proceeds of a Debenture to redeem Preferred Securities at their mandatory redemption date, including any accrued unpaid dividends or partnership distributions.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5869, Feb. 5, 1998]

§ 107.1440 Three percent preferred stock issued before November 21, 1989.

Before November 21, 1989, Preferred Securities were available only in the form of preferred stock and had a preferred and cumulative dividend of 3 percent. If you have such preferred stock outstanding, you must follow

§ 107.1400 (except for § 107.1400(d)), substituting "3 percent" for "4 percent" throughout.) Dividends on 3 percent preferred stock are payable at the discretion of your Board of Directors or General Partner(s), except that all dividends in arrears must be paid in full before any non-SBA investor receives any distribution. Upon your liquidation, SBA is entitled to payment of all dividends in arrears even if you have no Retained Earnings Available for Distribution at such time.

§ 107.1450 Optional redemption of Preferred Securities.

(a) *Redemption at par or face value.* A Section 301(d) Licensee may redeem Preferred Securities at any time, provided you give SBA at least 30 days written notice. You may redeem all or only part of your Preferred Securities, but the par value or face value of the securities being redeemed must be at least \$50,000. At the redemption date, you must pay to SBA:

(1) The par value (of preferred stock) or face value (of a preferred limited partnership interest); plus

(2) Any unpaid dividends or partnership distributions accrued to the redemption date.

(b) *Repurchase of 3 percent preferred stock for less than par value.* If you issued 3 percent preferred stock to SBA, you may ask SBA to sell it back to you at a price less than its par value. The terms and conditions of any such transaction will be as set forth in the Notice published in the FEDERAL REGISTER on April 1, 1994 (Copies of this notice are available from SBA, 409 3rd Street, SW., Washington, DC, 20416). SBA has sole discretion to:

(1) Approve or disapprove the sale.

(2) Determine the sale price after considering any factors SBA considers appropriate.

(3) Determine the form of payment SBA will accept. SBA is not authorized to accept the proceeds of a subsidized Debenture as payment.

PARTICIPATING SECURITIES LEVERAGE

§ 107.1500 General description of Participating Securities.

(a) *Types of Participating Securities.* Participating Securities are redeemable, preferred, equity-type securities. SBA may purchase or guarantee Participating Securities issued by Licensees in the form of limited partnership interests, preferred stock, or debentures with interest payable only to the extent of earnings. The structure, terms and conditions of Participating Securities are set forth in detail in §§ 107.1500 through 107.1590.

(b) *Special eligibility requirements for Participating Securities.* In addition to the general eligibility requirements for Leverage under § 107.1120, Participating Securities issuers must also comply with special rules on:

- (1) Minimum capital (see § 107.210).
- (2) Liquidity (see § 107.1505).
- (3) Non-SBA borrowing (see § 107.570).
- (4) Equity investing, as set forth in this paragraph (b)(4). If you issue Participating Securities, you must invest an amount equal to the Original Issue Price of such securities solely in Equity Capital Investments, as defined in § 107.50.

(c) *Special features of Participating Securities—Prioritized Payments, Adjustments, and Profit Participation.* When you issue Participating Securities, you agree to make the following payments:

(1) *Prioritized Payments.* Depending upon the type of Participating Security you issue, Prioritized Payments may be preferred partnership distributions, preferred dividends, or interest. Your obligation to pay Prioritized Payments is contingent upon your profits as determined under § 107.1520.

(2) *Adjustments to Prioritized Payments.* If you have unpaid Prioritized Payments, you must compute Adjustments, which are additional contingent obligations determined under § 107.1520. The conditions for paying Adjustments are the same as for Prioritized Payments.

(3) *SBA Profit Participation.* Profit Participation is an amount payable to SBA under § 107.1530 in consideration for SBA's guarantee of your Participating Securities.

(d) *Distributions by Licensees issuing Participating Securities.* Sections 107.1540 through 107.1580 govern both required

and optional Distributions by Participating Securities issuers. Distributions include both profit distributions and returns of capital, paid either to SBA or to your non-SBA investors.

(e) *Mandatory redemption of Participating Securities.* You must redeem Participating Securities at the redemption date, which is the same as the maturity date of the Trust Certificates for the Trust containing such securities. The redemption date can never be later than 15 years after the issue date. You must pay the Redemption Price plus any unpaid Earned Prioritized Payments and any earned Adjustments and earned Charges (see § 107.1520).

(f) *Priority of Participating Securities in liquidation of Licensee.* In the event of your liquidation, the following are senior in priority, for all purposes, to all other equity interests you have issued at any time:

- (1) The Redemption Price of Participating Securities;
- (2) Any Earned Prioritized Payments and any earned Adjustments and earned Charges (see § 107.1520); and
- (3) Any Profit Participation allocated to SBA under § 107.1530.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5869, Feb. 5, 1998]

§ 107.1505 Liquidity requirements for Licensees issuing Participating Securities.

If you have outstanding Participating Securities, you must maintain sufficient liquidity to avoid a condition of Liquidity Impairment. Such a condition will constitute noncompliance with the terms of your Leverage under § 107.1820(e).

(a) *Definition of Liquidity Impairment.* A condition of Liquidity Impairment exists when your Liquidity Ratio, as determined in paragraph (b) of this section, is less than 1.20. You are responsible for calculating whether you have a condition of Liquidity Impairment:

- (1) As of the close of your fiscal year;
- (2) At the time you apply for Leverage, unless SBA permits otherwise; and
- (3) At such time as you contemplate making any Distribution.

(b) *Computation of Liquidity Ratio.* Your Liquidity Ratio equals your Total Current Funds Available (A) divided by your Total Current Funds Required

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(B), as determined in the following table:

CALCULATION OF LIQUIDITY RATIO

| Financial account | Amount reported on SBA form 468 | Weight | Weighted amount |
|---|---------------------------------|--------|-----------------|
| (1) Cash and invested idle funds ..... | ..... | ×1.00 | ..... |
| (2) Commitments from investors ..... | ..... | ×1.00 | ..... |
| (3) Current maturities ..... | ..... | ×0.50 | ..... |
| (4) Other current assets ..... | ..... | ×1.00 | ..... |
| (5) Publicly Traded and Marketable Securities ..... | ..... | ×1.00 | ..... |
| (6) Anticipated operating revenue for next 12 months | (1) | ×1.00 | ..... |
| (7) Total Current Funds Available ..... | ..... |  | A |
| (8) Current liabilities ..... | ..... | ×1.00 | ..... |
| (9) Commitments to Small Businesses ..... | ..... | ×0.75 | ..... |
| (10) Anticipated operating expense for next 12 months | (1) | ×1.00 | ..... |
| (11) Anticipated interest expense for next 12 months | (1) | ×1.00 | ..... |
| (12) Contingent liabilities (guarantees) ..... | ..... | ×0.25 | ..... |
| (13) Total Current Funds Required ..... | ..... |  | B |

¹ As determined by Licensee's management under its business plan.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5869, Feb. 5, 1998]

§ 107.1510 How a Licensee computes Earmarked Profit (Loss).

Computing your Earmarked Profit (Loss) is the first step in determining your obligations to pay Prioritized Payments, Adjustments and Charges under § 107.1520 and Profit Participation under § 107.1530.

(a) *Requirement to compute your Earmarked Profit (Loss).* While you have Participating Securities outstanding or have Earmarked Assets (as defined in paragraph (b) of this section), you must compute your Earmarked Profit (Loss) for:

- (1) Each full fiscal year.
- (2) Any interim period (consisting of one or more fiscal quarters) for which you want to make a Distribution.

(b) *How to determine your Earmarked Assets.* "Earmarked Assets" means all the Loans and Investments that you have when you issue Participating Securities or that you acquire while you have Participating Securities outstanding, and any non-cash assets that you receive in exchange for such Loans and Investments.

(1) An Earmarked Asset remains earmarked until you dispose of it, even if you no longer have any outstanding Participating Securities.

(2) Investments you make after deeming all your Participating Securities are not Earmarked Assets. How-

ever, if you issue new Participating Securities, all of your Loans and Investments again become Earmarked Assets.

(3) If you were licensed before March 31, 1993, you may be permitted to exclude Loans and Investments held at that date from Earmarked Assets under § 107.1590.

(c) *How to compute your Earmarked Asset Ratio.* You must determine your Earmarked Asset Ratio each time you compute Earmarked Profit (Loss). If all your Loans and Investments are Earmarked Assets, your Earmarked Asset Ratio equals 100 percent. Otherwise, compute your Earmarked Asset Ratio using the following formula:

$$\text{EAR} = (\text{EA} \div \text{LI}) \times 100$$

where:

EAR = Earmarked Asset Ratio.

EA = Average Earmarked Assets (at cost) for the fiscal year or interim period.

LI = Average Loans and Investments (at cost) for the fiscal year or interim period.

(d) *How to compute your Earmarked Profit (Loss) if Earmarked Asset Ratio is 100 percent.* (1) (i) If your Earmarked Asset Ratio from paragraph (b) of this section is 100 percent, use the following formula to compute your Earmarked Profit (Loss):

$$\text{EP} = \text{NI} + \text{IK} + \text{EME}$$

where:

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EP = Earmarked Profit (Loss)

NI = Net Income (Loss), as reported on SBA Form 468 except as otherwise provided in this paragraph (d)(1)

IK = Unrealized Appreciation (Depreciation) on Earmarked Assets that you are distributing as an In-Kind Distribution under § 107.1580

EME = Excess Management Expenses

(ii) For the purpose of determining Net Income (Loss), leverage fees paid to SBA and partnership syndication costs that you incur must be capitalized and amortized on a straight-line basis over not less than five years.

(2) “Excess Management Expenses” are those that exceed the following limit:

(i) For a full fiscal year, the limit is the lower of:

(A) 2.5 percent of your weighted average Combined Capital for the year, plus \$125,000 if Combined Capital is below \$20,000,000; or

(B) Your Management Expenses approved by SBA.

(ii) For less than a full fiscal year, you must prorate the annual amounts in paragraph (d)(2)(i) of this section to determine the limit.

(e) *How to compute your Earmarked Profit (Loss) if Earmarked Asset Ratio is less than 100 percent.* If your Earmarked Asset Ratio is less than 100 percent, compute your Earmarked Profit (Loss) as follows:

(1) Do the Earmarked Profit (Loss) computation in paragraph (d) of this section.

(2) Subtract your net realized gain (loss) (as reported on SBA Form 468) on Loans and Investments that are not Earmarked Assets.

(3) Separate the result from paragraph (e)(2) of this section into:

(i) Net realized gain (loss) (as reported on SBA Form 468) on Earmarked Assets (“EGL”); and

(ii) The remainder (“R”).

(4) Your Earmarked Profit (Loss) equals:

$EGL + (R \times \text{Earmarked Asset Ratio})$

(f) *How to compute your cumulative Earmarked Profit (Loss).* Sum your Earmarked Profit (Loss) for all fiscal years and for any interim period following the end of your last fiscal year. The total is your cumulative Ear-

marked Profit (Loss), which you must use in the Prioritized Payment computations under § 107.1520.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5870, Feb. 5, 1998]

§ 107.1520 How a Licensee computes and allocates Prioritized Payments to SBA.

This section tells you how to compute Prioritized Payments, Adjustments and Charges on Participating Securities and determine the amounts you must pay. To distribute these amounts, see § 107.1540.

(a) *How to compute Prioritized Payments and Adjustments—*(1) *Prioritized Payments.* For a full fiscal year, the Prioritized Payment on an outstanding Participating Security equals the Redemption Price times the related Trust Certificate Rate. For an interim period, you must prorate the annual Prioritized Payment. If your Participating Security was sold to a short-term investor in accordance with § 107.1240, the Prioritized Payment for the short-term period equals the Redemption Price times the short-term rate.

(2) *Adjustments.* Compute Adjustments using paragraph (f) of this section.

(3) *Charges.* Compute Charges in accordance with § 107.1130(d)(2).

(b) *Licensee’s obligation to pay Prioritized Payments, Adjustments and Charges.* You are obligated to pay Prioritized Payments, Adjustments and Charges only if you have profit as determined in paragraph (d) of this section.

(1) Prioritized Payments that you must pay (or have already paid) because you have sufficient profit are “Earned Prioritized Payments”.

(2) Prioritized Payments that have not become payable because you lack sufficient profit are “Accumulated Prioritized Payments”. Treat all Prioritized Payments as “Accumulated” until they become “Earned” under this section.

(3) Adjustments (computed under paragraph (f) of this section) and Charges (computed under § 107.1130(d)(2)) are “earned” according to the same criteria applied to Prioritized Payments.

(c) *How to keep track of Prioritized Payments.* You must establish three accounts to record your Accumulated and Earned Prioritized Payments:

(1) *Accumulation Account.* The Accumulation Account is a memorandum account. Its balance represents your Accumulated Prioritized Payments, unearned Adjustments and unearned Charges.

(2) *Distribution Account.* The Distribution Account is a liability account. Its balance represents your unpaid Earned Prioritized Payments, earned Adjustments and earned Charges.

(3) *Earned Payments Account.* The Earned Payments Account is a memorandum account. Each time you add to the Distribution Account balance, add the same amount to the Earned Payments Account. Its balance represents your total (paid and unpaid) Earned Prioritized Payments, earned Adjustments and earned Charges.

(d) *How to determine your profit for Prioritized Payment purposes.* As of the end of each fiscal year and any interim period for which you want to make a Distribution:

(1) Bring the Accumulation Account up to date by adding to it all Prioritized Payments and Charges through the end of the appropriate fiscal period.

(2) Determine whether you have profit for the purposes of this section by doing the following computation:

(i) Cumulative Earmarked Profit (Loss) under § 107.1510(f); minus

(ii) The Earned Payments Account balance; minus

(iii) All Distributions previously made under §§ 107.1550, 107.1560 and 107.1570(a); minus

(iv) Any Profit Participation previously allocated to SBA under § 107.1530, but not yet distributed.

(3) The amount computed in paragraph (d)(2) of this section, if greater than zero, is your profit. If the amount is zero or less, you have no profit.

(4) If you have a profit, continue with paragraph (e) of this section. Otherwise, continue with paragraph (f) of this section.

(e) *Allocating Prioritized Payments to the Distribution Account.* (1) If you have a profit under paragraph (d) of this section, determine the lesser of:

(i) Your profit; or

(ii) The balance in your Accumulation Account.

(2) Subtract the result in paragraph (e)(1) of this section from the Accumulation Account and add it to the Distribution Account and the Earned Payments Account.

(f) *How to compute Adjustments.* You must compute Adjustments as of the end of each fiscal year if you have a balance greater than zero in either your Accumulation Account or your Distribution Account, after giving effect to any Distribution that will be made no later than the second Payment Date following the fiscal year end.

(1) Determine the combined average Accumulation Account and Distribution Account balances for the fiscal year, assuming that Prioritized Payments accumulate on a daily basis without compounding.

(2) Multiply the average balance computed in paragraph (f)(1) of this section by the average of the Trust Certificate Rates for all the Participating Securities poolings during the fiscal year.

(3) Add the amounts computed in this paragraph (f) to your Accumulation Account.

(g) *Licensee's obligation to pay Prioritized Payments after redeeming Participating Securities.* This paragraph (g) applies if you have redeemed all your Participating Securities, but you still hold Earmarked Assets and still have a balance in your Accumulation Account.

(1) You must continue to perform all the procedures in this section as of the end of each fiscal quarter and prior to making any Distribution. You must distribute any Earned Prioritized Payments, earned Adjustments and earned Charges in accordance with § 107.1540.

(2) After you dispose of all your Earmarked Assets and make any required Distributions in accordance with § 107.1540, your obligation to pay any remaining Accumulated Prioritized Payments, unearned Adjustments and unearned Charges will be extinguished.

[63 FR 5870, Feb. 5, 1998]

§ 107.1530 How a Licensee computes SBA's Profit Participation.

This section tells you how to compute SBA's Profit Participation. Profit Participation is included in the Distributions you make to SBA under §§ 107.1550 and 107.1560.

(a) *How to compute Profit Participation.* Profit Participation equals your "Base" times your "Profit Participation Rate" (if the Base is zero or less, you do not owe SBA Profit Participation). Compute the Base using paragraph (c) of this section and the Profit Participation Rate using paragraphs (d) through (g) of this section. You must compute your Earmarked Profit (Loss) under § 107.1510 and your Prioritized Payments and Adjustments under § 107.1520 before you can compute Profit Participation.

(b) *How to keep track of Profit Participation.* You must establish a Profit Participation Account to record your computations under this section and payments under §§ 107.1550 and 107.1560. Its balance represents your unpaid Profit Participation.

(c) *How to compute the Base.* As of the end of each fiscal year and any year-to-date interim period for which you want to make a Distribution, compute your Base using the following formula:

$$B = EP - PPA - UL$$

where:

B = Base.

EP = Earmarked Profit (Loss) for the period from § 107.1510.

PPA = Prioritized Payments for the period from § 107.1520(a)(1), Adjustments (if applicable) from § 107.1520(f), and Charges (if applicable) from § 107.1130(d)(2).

UL = "Unused Loss" from prior periods as determined in this paragraph (c).

(1) If the Base computed as of the end of your previous fiscal year (your "Previous Base") was less than zero, your Unused Loss equals your Previous Base.

(2) If your Previous Base was zero or greater, your Unused Loss equals zero, with the following exception: If you made an interim Distribution of Profit Participation during your previous fiscal year, and your Previous Base was lower than the interim Base on which

your Distribution was computed, then your Unused Loss equals the difference between the interim Base and the Previous Base. For example, assume you are computing your Base as of December 31, 1997, your fiscal year end. Your Previous Base, computed as of December 31, 1996, was \$3,000,000. During 1996, you made an interim Distribution which was computed on a Base of \$3,500,000 as of June 30, 1996. The \$500,000 difference between the 1996 interim and year-end Bases would be carried forward as Unused Loss in the computation of your Base as of December 31, 1997.

(3) If you had no Participating Securities outstanding as of the end of your last fiscal year, you may request SBA's approval to treat your Undistributed Net Realized Loss, as reported on SBA Form 468 for that year, as Unused Loss. If you did not file SBA Form 468 because you were not yet licensed as of the end of your last fiscal year, you may request SBA's approval to treat pre-licensing losses as Unused Loss.

(d) *How to compute the Profit Participation Rate.* You must determine your Profit Participation Rate each time you compute a Base that is greater than zero. Compute the Rate by following the steps in paragraphs (e) through (g) of this section.

(e) *Compute the "PLC ratio".* (1) *General rule.* The "PLC ratio" is the highest ratio of outstanding Participating Securities to Leverageable Capital that you have ever attained.

(2) *Exception.* You may reduce the ratio computed under paragraph (e)(1) of this section if you have increased your Leverageable Capital above its highest previous level. The increase must have taken place at least 120 days before the date as of which your Base is computed. In addition, the increase must have been expressly provided for in a plan of operations submitted to and approved by SBA in writing, or must be the result of the takedown of commitments or the conversion of non-cash assets that were included in your Private Capital. If these conditions are satisfied, compute your reduced PLC ratio as follows:

(i) Divide the highest dollar amount of Participating Securities you have

ever had outstanding by your increased Leverageable Capital.

(ii) If the result in paragraph (e)(2)(i) of this section is lower than your PLC ratio currently in effect, such result will become your new PLC ratio.

(f) *Compute the Profit Participation Rate (before indexing).* Compute the Profit Participation Rate (before indexing) using the table in this paragraph (f). Then go to paragraph (g) of this section to determine whether to index the Profit Participation Rate.

| If your PLC ratio is: | Then your Profit Participation Rate is: |
|-----------------------|---|
| 1 or less | 9%×PLC Ratio. |
| More than 1 | 9%+[3%×(PLC ratio-1)]. |

(g) *Indexing the Profit Participation Rate.* The Profit Participation Rate is indexed, up or down, to the yield-to-maturity on Treasury bonds with a remaining term of ten (10) years (the "Treasury Rate"). You must perform the indexing procedures in this paragraph (g) unless the Treasury Rate was exactly 8 percent on every date that you issued Participating Securities.

(1) *Licensees that have issued Participating Securities on only one occasion.* Determine the Treasury Rate for the date you issued your Participating Security. Adjust the Profit Participation Rate from paragraph (f) of this section by the percentage difference between the Treasury Rate and 8 percent. For example, assume that you issued Participating Securities when the Treasury Rate was 10 percent. The percentage difference between 10 percent and 8 percent is 25 percent. If you had a PLC ratio of 1, the Profit Participation Rate before indexing would be 9 percent. You would increase this rate by 25 percent, giving you a Profit Participation Rate of 11.25 percent.

(2) *Licensees that have issued Participating Securities on more than one occasion.* Determine the Treasury Rate for each of the dates you issued Participating Securities.

(i) Compute an average of all such Treasury Rates, weighted to reflect the dollar amount of each issuance (ignoring any redemptions) and the number of days from the date of each issuance to the date as of which you are computing the Profit Participation Rate.

Example to paragraph (g)(2)(i) of this section. If you issued \$10 million of Participating Securities on the 60th day of Fiscal Year 1 when the Treasury Rate was 8 percent, and another \$15 million on the 100th day of Fiscal Year 3 when the Treasury Rate was 10 percent, then the weighted average Treasury Rate computed as of the end of Fiscal Year 3 would be 8.55 percent. [Days elapsed since first issuance of Participating Securities = 1,035; days elapsed since second issuance of Participating Securities = 265; weighted amount of first issuance = $\$10,000,000 \times 1,035/1,035 = \$10,000,000$; weighted amount of second issuance = $\$15,000,000 \times 265/1035 = \$3,840,579$; weighted average amount of Participating Securities issued = $\$10,000,000 + \$3,840,579 = \$13,840,579$; weighted average Treasury Rate = $\{(.08 \times \$10,000,000) + (.10 \times \$3,840,579)\} / \$13,840,579 = 8.55\%$]

(ii) Adjust the Profit Participation Rate from paragraph (f) of this section by the percentage difference between the weighted average Treasury Rate and 8 percent. In the example given in paragraph (g)(2)(i) of this section, if the PLC ratio were equal to 2, the Profit Participation Rate for the fiscal year would be 12.83 percent. [$\{((.0855 - .08) \div .08) + 1\} \times .12 \times 100 = 12.83\%$]

(h) *Computing SBA's Profit Participation.* If the Base from paragraph (c) of this section is greater than zero, you must compute SBA's Profit Participation as follows:

(1) Multiply the Base from paragraph (c) of this section by the Profit Participation Rate from paragraph (g) of this section.

(2) If your last Profit Participation computation was for an interim period during the same fiscal year and used a higher Profit Participation Rate than the Rate you just used in paragraph (h)(1) of this section, you must adjust the amount computed in paragraph (h)(1) of this section as follows:

(i) Determine the difference between the Profit Participation Rate you just used in paragraph (h)(1) of this section and the Rate used in your previous computation;

(ii) Multiply the difference by the Base from your last Profit Participation computation; and

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(iii) Add the result to the amount you computed in paragraph (h)(1) of this section.

(3) Reduce the Profit Participation computed in paragraphs (h)(1) and (h)(2) of this section by any amounts of Profit Participation that you distributed or reserved for distribution to SBA, or its designated agent or Trustee, for any previous interim period(s) during the fiscal year. The result is SBA's Profit Participation (unless it is less than zero, in which case SBA's Profit Participation is zero).

(i) *Allocation of Profit Participation.* Before any Distribution and in any case within 120 days following the end of your fiscal year, you must add the amount of Profit Participation computed under this §107.1530 to the Profit Participation Account. You must reserve funds equal to this amount for distribution to SBA, or its designated agent or Trustee; you may not reinvest these funds or use them for any other purpose.

[61 FR 3189, Jan. 31, 1996; 61 FR 41496, Aug. 9, 1996, as amended at 63 FR 5871, Feb. 5, 1998]

§ 107.1540 Distributions by Licensee— Prioritized Payments and Adjustments.

After you compute Prioritized Payments and Adjustments under §107.1520, you must distribute them in accordance with this §107.1540. You must notify SBA of any planned distribution under this section 10 business days before the distribution date, unless SBA permits otherwise.

(a) *Requirement to distribute Prioritized Payments and Adjustments.* This paragraph (a) applies only if you satisfy the liquidity requirement in §107.1505. All Distributions under this paragraph (a) go to SBA or its designated agent or trustee.

(1) You must distribute the balance in your Distribution Account from §107.1520 annually on the first or second Payment Date following your fiscal year end, and on any date when you are making any other Distribution.

(2) You may distribute all or part of the balance in your Distribution Account on any Payment Date regardless of whether you are making any other Distribution on that date.

(b) *Additional requirement for Licensees with undistributed Prioritized Payments.* This paragraph (b) applies if you do not distribute the full amount in your Distribution Account by the second Payment Date following the end of your fiscal year. At the end of each fiscal quarter, until you reduce the balance in your Distribution Account to zero, you must:

(1) Do all the steps in §107.1520; and

(2) Distribute the balance in your Distribution Account on the next Payment Date following the end of your fiscal quarter, provided you satisfy the liquidity requirement in §107.1505.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5871, Feb. 5, 1998]

§ 107.1550 Distributions by Licensee— permitted “tax Distributions” to private investors and SBA.

If you have outstanding Participating Securities or Earmarked Assets, and you are a limited partnership, “S Corporation,” or equivalent pass-through entity for tax purposes, you may make “tax Distributions” to your investors in accordance with this §107.1550, whether or not they have an actual tax liability. SBA receives a share of any tax Distribution you make. This section tells you when you may make a “tax Distribution” and how to compute it. You must notify SBA of any planned distribution under this section 10 business days before the distribution date, unless SBA permits otherwise.

(a) *Conditions for making a tax Distribution.* You may make a tax Distribution only if:

(1) You have paid all your Prioritized Payments, Adjustments, and Charges, so that the balance in both your Distribution Account and your Accumulation Account is zero (see §107.1520).

(2) You satisfy the liquidity requirement in §107.1505.

(3) The tax Distribution does not exceed your Retained Earnings Available for Distribution.

(4) The tax Distribution does not exceed the Maximum Tax Liability from paragraph (b) of this section.

(b) *How to compute the Maximum Tax Liability.* (1) You may compute your Maximum Tax Liability for a full fiscal

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year or for any calendar quarter. Use the following formula:

$$M = (TOI \times HRO) + (TCG \times HRC)$$

where:

M = Maximum Tax Liability

TOI = Net ordinary income allocated to your partners or other owners for Federal income tax purposes for the fiscal year or calendar quarter for which the Distribution is being made, excluding Prioritized Payments allocated to SBA.

HRO = The highest combined marginal Federal and State income tax rate for corporations or individuals on ordinary income, determined in accordance with paragraphs (b)(2) through (b)(4) of this section.

TCG = Net capital gains allocated to your partners or other owners for Federal income tax purposes for the fiscal year or calendar quarter for which the Distribution is being made, excluding Prioritized Payments allocated to SBA.

HRC = The highest combined marginal Federal and State income tax rate for corporations or individuals on capital gains, determined in accordance with paragraphs (b)(2) through (b)(4) of this section.

(2) You may compute the highest combined marginal Federal and State income tax rate on ordinary income and capital gains using either individual or corporate rates. However, you must apply the same type of rate, either individual or corporate, to both ordinary income and capital gains.

(3) In determining the combined Federal and State income tax rate, you must assume that State income taxes are deductible from Federal income taxes. For example, if the Federal tax rate was 35 percent and the State tax rate was 5 percent, the combined tax rate would be $[35\% \times (1 - .05)] + 5\% = 38.25\%$.

(4) For purposes of this paragraph (b), the "State income tax" is that of the State where your principal place of business is located, and does not include any local income taxes.

(c) *SBA's share of the tax Distribution.*

(1) SBA's percentage share of the tax Distribution is equal to the Profit Par-

ticipation Rate computed under § 107.1530.

(2) SBA may direct you to pay its share of the tax Distribution to its designated agent or Trustee.

(3) SBA will apply its share of the tax Distribution in the order set forth in § 107.1560(g).

(d) *Paying a tax Distribution.* You may make an annual tax Distribution on the first or second Payment Date following the end of your fiscal year. You may make a quarterly tax Distribution on the first Payment Date following the end of the calendar quarter for which the Distribution is being made. See also § 107.1575(a).

(e) *Excess tax Distributions.* (1) As of the end of your fiscal year, you must determine whether you made any excess tax Distributions for the year in accordance with paragraph (e)(2) of this section. Any tax Distributions that you make for a subsequent period must be reduced by the excess amount distributed.

(2) Determine your excess tax Distributions by adding together all your quarterly tax Distributions for the year (ignoring any required reductions for excess tax Distributions made in prior years), and subtracting the maximum tax Distribution that you would have been permitted to make based upon a single computation performed for the entire fiscal year. The result, if greater than zero, is your excess tax Distribution for the year.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5871, Feb. 5, 1998; 64 FR 70996, Dec. 20, 1999]

§ 107.1560 Distributions by Licensee—required Distributions to private investors and SBA.

You must make Distributions under this § 107.1560 if you have outstanding Participating Securities or Earmarked Assets and you satisfy the conditions in paragraph (a) of this section. Distributions under this section are determined as of the end of each fiscal year. You must notify SBA of any planned distribution under this section 10 business days before the distribution date, unless SBA permits otherwise.

(a) *Conditions for making Distributions.* Distributions under this section are subject to the following conditions:

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(1) You must have paid all Prioritized Payments, Adjustments and Charges, so that the balance in both your Distribution Account and your Accumulation Account is zero (see §§ 107.1520 and 107.1540).

(2) You must have made any permitted tax Distribution that you choose to make under § 107.1550.

(3) You must satisfy the liquidity requirement in § 107.1505.

(4) The amount you distribute under this section must not exceed your remaining Retained Earnings Available for Distribution.

(b) *Total amount you must distribute.* Unless SBA permits otherwise, the total amount you must distribute equals the result (if greater than zero) of the following computation:

(1) Your Retained Earnings Available for Distribution as of the end of your fiscal year, after giving effect to any Distribution under §§ 107.1540 and 107.1550; minus

(2) All previous Distributions under this section and § 107.1570(a) that were applied as redemptions or repayments of Leverage; plus

(3) All previous Distributions under § 107.1570(b) that reduced your Retained Earnings Available for Distribution.

(c) *When you must make Distributions.* You must make the required Distributions on either the first or second Payment Date following the end of your fiscal year.

(d) *Effect of Distributions on Retained Earnings Available for Distribution.* Distributions under this § 107.1560 have the following effect on your Retained Earnings Available for Distribution:

(1) All Distributions to private investors reduce Retained Earnings Available for Distribution.

(2) Distributions to SBA, or its designated agent or Trustee, reduce Retained Earnings Available for Distribution if they are applied as payments of Profit Participation or distributions on Preferred Securities (see paragraph (g) of this section).

(3) Distributions to SBA, or its designated agent or Trustee, do not reduce Retained Earnings Available for Distribution if they are applied as a repayment or redemption of Leverage (see paragraph (g) of this section).

(e) *SBA's share of the total Distribution.* Use the following table to determine the percentage share of the total Distribution (from paragraph (b) of this section) that goes to SBA (or its designated agent or Trustee):

SBA'S PERCENTAGE SHARE OF TOTAL DISTRIBUTION

| If your ratio of Leverage to Leverageable Capital as of the fiscal period end is: | Then SBA's percentage share of the Distribution is: |
|---|---|
| Over 200% | $\frac{[\text{Leverage} / (\text{Leverage} + \text{Leverageable Capital})] \times 100}{100}.$ |
| Over 100% but not over 200%. | 50%. |
| 100% or less | Profit Participation Rate from § 107.1530. |

(f) *Exceptions to the Distribution requirement.* (1) With SBA's prior written approval, you may withhold from distribution reasonable reserves necessary to protect your investments or relative position in Loans and Investments and to meet contingent liabilities.

(i) If you submit a written request for SBA approval, you may consider it approved unless SBA notifies you otherwise within 30 days from receipt.

(ii) Reserves that you withhold from distribution may not be used to make investments in additional portfolio companies.

(iii) Withholding of reserves under this paragraph (f)(1) is not a "payment failure" in violation of § 107.1820(e)(6).

(2) SBA may restrict Distributions under this § 107.1560 if SBA determines that the value of your assets is materially overstated. SBA must give you notice of such a determination in advance of your proposed Distribution.

(g) *How SBA will apply your Distributions.* Your Distributions to SBA (or its designated agent or Trustee) under this § 107.1560 will be applied in the following order:

(1) First, to Profit Participation;

(2) Second, to the extent there remain any Retained Earnings Available for Distribution, to distributions on Preferred Securities;

(3) Third, as a redemption of Participating Securities in order of issue;

(4) Fourth, as a redemption of Preferred Securities; and

(5) Fifth, as the repayment of principal of any outstanding Debentures,

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with such repayment to be made into escrow on terms and conditions SBA determines.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5872, Feb. 5, 1998]

§ 107.1570 Distributions by Licensee—optional Distribution to private investors and SBA.

If you have outstanding Participating Securities or Earmarked Assets, you may make two types of optional Distributions under this § 107.1570: quarterly Distributions determined the same way as the required annual Distributions in § 107.1560, and Distributions allocated between SBA and your private investors in proportion to the capital contributions of each. You must notify SBA of any planned distribution under this section 10 business days before the distribution date, unless SBA permits otherwise.

(a) *Quarterly Distributions subject to conditions in § 107.1560.* (1) You may make Distributions under this paragraph (a) as of the end of any fiscal quarter, giving SBA (or its designated agent or Trustee) a percentage share determined under § 107.1560(e).

(2) Such Distributions are subject to all the provisions in § 107.1560 (a)(1), (a)(3), (a)(4), (d), (f)(2), and (g).

(3) You may make such Distributions only on the next Payment Date following the end of your fiscal quarter.

(4) The total amount of such Distributions may not exceed the result of the following computation:

(i) Your Retained Earnings Available for Distribution as of the end of your fiscal quarter; minus

(ii) All previous Distributions under this paragraph (a) or § 107.1560 that were applied as redemptions or repayments of Leverage; plus

(iii) All previous Distributions under paragraph (b) of this section that reduced your Retained Earnings Available for Distribution.

(b) *Other optional Distributions.* On any Payment Date, you may make additional Distributions to your private investors and to SBA (or its designated agent or Trustee) under this paragraph (b).

(1) *Conditions for making a Distribution.* You may make a Distribution under this paragraph (b) only if:

(i) You have distributed all Earned Prioritized Payments, earned Adjustments, and earned Charges, so that the balance in your Distribution Account is zero (see § 107.1520).

(ii) You have distributed all Profit Participation computed under § 107.1530 which you are required to distribute under § 107.1560 or permitted to distribute under paragraph (a) of this section, as appropriate, and you have made all required Distributions under § 107.1560.

(iii) You satisfy the liquidity requirement in § 107.1505 or obtain SBA's prior written approval of the Distribution.

(iv) You do not have a condition of Capital Impairment.

(v) The Distribution does not reduce your Regulatory Capital (excluding commitments from Institutional Investors) below the minimum required under § 107.210, unless SBA approves the reduction as part of a plan of liquidation.

(vi) The Distribution does not cause you to have excess Leverage contrary to section 303 of the Act.

(2) *SBA's share of Distribution.* (i) If your Capital Impairment Percentage under § 107.1840 is zero, SBA's percentage share of any Distribution under this paragraph (b) equals:

$$[\text{Leverage}/(\text{Leverage} + \text{Leverageable Capital})] \times 100$$

In this formula, use Leverage and Leverageable Capital as of the date of the Distribution, after giving effect to any Distribution under § 107.1560 and paragraph (a) of this section.

(ii) If your Capital Impairment Percentage under § 107.1840 is greater than zero, you must modify the formula in paragraph (b)(2)(i) of this section by replacing Leverageable Capital with:

$$\text{Leverageable Capital} \times (100\% - \text{CIP})$$

where "CIP" is your Capital Impairment Percentage or 100 percent, whichever is less.

(3) *How SBA will apply Distributions.* Any amounts you distribute to SBA, or its designated agent or Trustee, under this paragraph (b) will be applied as a repayment or redemption of Leverage in the order set forth in § 107.1560 (g)(3) through (g)(5).

(4) *Effect of Distributions on Retained Earnings Available for Distribution.* Any

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amounts you distribute to non-SBA investors under this paragraph (b) must reduce your Retained Earnings Available for Distribution to zero before reducing your Private Capital.

(5) *Permitted exception to § 107.585.* You may make any Distribution permitted by this paragraph (b), even if the result is a reduction in your Regulatory Capital that would otherwise be prohibited under § 107.585.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5872, Feb. 5, 1998]

§ 107.1575 Distributions on other than Payment Dates.

(a) *Permitted Distributions on other than Payment Dates.* Notwithstanding any provisions to the contrary in §§ 107.1540 through 107.1570, you may make Distributions on dates other than Payment Dates as follows:

(1) Required annual Distributions under § 107.1540(a)(1), annual Distributions under § 107.1550, and any Distributions under § 107.1560 must be made no later than the second Payment Date following the end of your fiscal year.

(2) Required Distributions under § 107.1540(b) must be made no later than the first Payment Date following the end of the applicable fiscal quarter;

(3) Optional Distributions under § 107.1540(a)(2) and § 107.1570 may be made on any date.

(4) Quarterly Distributions under § 107.1550 must be made no earlier than the last day of the calendar quarter for which the Distribution is being made and no later than the first Payment Date following the end of such calendar quarter.

(b) *Conditions for making Distribution.* All Distributions under this section are subject to the following conditions:

(1) You must obtain SBA's written approval before the distribution date;

(2) The ending date of the period for which you compute your Earmarked Profits, Prioritized Payments, Adjustments, Charges, Profit Participation, Retained Earnings Available for Distribution, liquidity ratio, Capital Impairment, and any other applicable computations required under §§ 107.1500 through 107.1570, must be:

(i) The distribution date, or

(ii) If your Distribution includes annual Distributions under

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§§ 107.1540(a)(1), 107.1550 and/or 107.1560, your most recent fiscal year end;

(3) If your Distribution includes an amount which SBA will apply as a redemption of Participating Securities, the effective date of such redemption, for all purposes including future computations of Prioritized Payments, will be the next Payment Date following the distribution date.

[63 FR 5872, Feb. 5, 1998, as amended at 64 FR 70997, Dec. 20, 1999]

§ 107.1580 Special rules for In-Kind Distributions by Licensees.

(a) *In-Kind Distributions while Licensee has outstanding Participating Securities.* A Distribution under §§ 107.1540, 107.1560 or 107.1570 may consist of securities (an "In-Kind Distribution"). Such a Distribution must satisfy the conditions in this paragraph (a).

(1) You may distribute only Distributable Securities.

(2) You must distribute each security pro-rata to all investors and to SBA or its designated agent or Trustee, based on the amounts that each party would receive if the Distribution were in cash.

(3) You must impute a gain (loss) on each security being distributed as if it were being sold, using the value of the security as of the declaration date of the Distribution (if you are a Corporate Licensee) or the distribution date (if you are a Partnership Licensee).

(4) You must deposit SBA's share of securities being distributed with a disposition agent designated by SBA. As an alternative, if you agree, SBA may direct you to dispose of its shares. In this case, you must promptly remit the proceeds to SBA.

(b) *In-Kind Distributions after Licensee has redeemed all Participating Securities.* This paragraph (b) applies from the time you redeem all your Participating Securities until you dispose of all your Earmarked Assets.

(1) You may make an In-Kind Distribution of an Earmarked Asset only if you pay SBA the lower of:

(i) An amount equal to the Unrealized Appreciation on the asset; or

(ii) The full amount of your Accumulated Prioritized Payments and unpaid Adjustments.

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(2) You must obtain SBA's prior written approval of any In-Kind Distribution of Earmarked Assets that are not Distributable Securities, specifically including approval of the valuation of the assets.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5872, Feb. 5, 1998; 64 FR 70997, Dec. 20, 1999]

§ 107.1585 Exchange of Debentures for Participating Securities.

You may, in SBA's discretion, retire a Debenture through the issuance of Participating Securities. To do so, you must:

- (a) Obtain SBA's approval to issue Participating Securities;
- (b) Pay all unpaid accrued interest on the Debenture, plus any applicable prepayment penalties, fees, and other charges;
- (c) Have outstanding Equity Capital Investments (at cost) equal to the amount of the Debenture being refinanced; and
- (d) Classify all your existing Loans and Investments as Earmarked Assets.

[63 FR 5869, Feb. 5, 1998]

§ 107.1590 Special rules for companies licensed on or before March 31, 1993.

This section applies to companies licensed on or before March 31, 1993 that apply to issue Participating Securities.

(a) *Election to exclude pre-existing portfolio.* You may choose to exclude all (but not a portion) of your Loans and Investments as of March 31, 1993, from classification as Earmarked Assets if:

(1) The proceeds of your first issuance of Participating Securities are not used to refinance outstanding Debentures (see § 107.1585(a)). SBA will consider payment or prepayment of any outstanding Debenture to be a refinancing unless you demonstrate to SBA's satisfaction that you can pay the Debenture principal without relying on the proceeds of the Participating Securities.

(2) SBA, in its sole discretion, approves the exclusion.

(b) *Treatment of pre-existing portfolio if not excluded.* If you do not choose to exclude your Loans and Investments as of March 31, 1993, they will be Earmarked Assets for all purposes.

(c) *Requirements for Licensee's first issuance of Participating Securities.* When you apply for your first issuance of Participating Securities, you must comply with the following:

(1) For each of your Loans and Investments, you must submit:

- (i) The most recent annual report (or fiscal year-end financial statements) and the most recent interim financial statements of the Small Business; and
- (ii) Your valuation reports on the Small Business, prepared as of the end of each of your last three fiscal years. If you have applied for Participating Securities on the basis of interim financial statements, you must also submit a valuation report as of your interim financial statement date.

(2) If you have negative Undistributed Net Realized Earnings and/or a net Unrealized Loss on Securities Held, SBA may require you to undergo a quasi-reorganization in accordance with generally accepted accounting principles.

(3) If your financial statements accompanying the Participating Securities application are for an interim period, you must have your SBA-approved independent public accountant perform a limited-scope audit of the statements. For purposes of this paragraph (d)(3), "limited scope audit" means auditing procedures sufficient to enable the independent public accountant to express an opinion on the Statement of Financial Position and the accompanying Schedule of Loans and Investments.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5873, Feb. 5, 1998]

FUNDING LEVERAGE BY USE OF SBA-GUARANTEED TRUST CERTIFICATES ("TCS")

§ 107.1600 SBA authority to issue and guarantee Trust Certificates.

(a) *Authorization.* Sections 319(a) and (b) of the Act authorize SBA or its CRA to issue TCs, and SBA to guarantee the timely payment of the principal and interest thereon. Any guarantee by SBA of such TC is limited to the principal and interest due on the Debentures or the Redemption Price of and Prioritized Payments on Participating

Securities in any Trust or Pool backing such TC. The full faith and credit of the United States is pledged to the payment of all amounts due under the guarantee of any TC.

(b) *Periodic exercise of authority.* SBA will issue guarantees of Debentures and Participating Securities under section 303 and of TCs under section 319 of the Act at six month intervals, or at shorter intervals, taking into account the amount and number of such guarantees or TCs.

(c) *SBA authority to arrange public or private fundings of Leverage.* SBA in its discretion may arrange for public or private financing under its guarantee authority. Such financing arranged by SBA may be accomplished by the sale of individual Debentures or Participating Securities, aggregations of Debentures or Participating Securities, or Pools or Trusts of Debentures or Participating Securities.

(d) *Pass-through provisions.* TCs shall provide for a pass-through to their holders of all amounts of principal and interest paid on the Debentures, or the Redemption Price of and Prioritized Payments on the Participating Securities, in the Pool or Trust against which they are issued.

(e) *Formation of a Pool or Trust holding Leverage Securities.* SBA shall approve the formation of each Pool or Trust. SBA may, in its discretion, establish the size of the Pools and their composition, the interest rate on the TCs issued against Trusts or Pools, fees, discounts, premiums and other charges made in connection with the Pools, Trusts, and TCs, and any other characteristics of a Pool or Trust it deems appropriate.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5873, Feb. 5, 1998]

§ 107.1610 Effect of prepayment or early redemption of Leverage on a Trust Certificate.

(a) The rights, if any, of a Licensee to prepay any Debenture or make early redemption of any Participating Security are established by the terms of such securities, and no such right is created or denied by the regulations in this part.

(b) SBA's rights to purchase or prepay any Debenture without premium

are established by the terms of the Guaranty Agreement relating to the Debenture. SBA's rights to redeem, at any time, any Participating Security without premium are established by the terms of the Guaranty Agreement relating to the Participating Security.

(c) Any prepayment of a Debenture or early redemption of a Participating Security pursuant to the terms of the Guaranty Agreement relating to such securities, shall reduce the SBA guarantee of timely payment of principal and interest on a TC in proportion to the amount of principal or Redemption Price that such prepaid Debenture or redeemed Participating Security represents in the Trust or Pool backing such TC.

(d) SBA shall be discharged from its guarantee obligation to the holder or holders of any TC, or any successor or transferee of such holder, to the extent of any such prepayment, whether or not such successor or transferee shall have notice of any such prepayment.

(e) Interest on prepaid Debentures and Prioritized Payments on Participating Securities shall accrue only through the date of such voluntary prepayment or SBA payment, as the case may be.

(f) In the event that all Debentures or Participating Securities constituting a Trust or Pool are prepaid, the TCs backed by such Trust or Pool shall be redeemed by payment of the unpaid principal and interest on the TCs; *Provided, however,* that in the case of the prepayment of a Debenture pursuant to the provisions of the Guaranty Agreement relating to the Debenture, the CRA shall pass through pro rata to the holders of the TCs any such prepayments including any prepayment penalty paid by the obligor Licensee pursuant to the terms of the Debenture.

§ 107.1620 Functions of agents, including Central Registration Agent, Selling Agent and Fiscal Agent.

(a) *Agents.* SBA will appoint or cause to be appointed agent(s) to perform functions necessary to market and service Debentures, Participating Securities, or TCs pursuant to this part.

(1) *Selling Agent.* As a condition of guaranteeing a Debenture or Participating Security, SBA shall cause each

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Licensee to appoint a Selling Agent to perform functions which include, but are not limited to:

(i) Selecting qualified entities to become pool or Trust assemblers ("Poolers").

(ii) Receiving guaranteed Debentures and Participating Securities as well as negotiating the terms and conditions of periodic offerings of Debentures and/or TCs with Poolers on behalf of Licensees.

(iii) Directing and coordinating periodic sales of Debentures and Participating Securities and/or TCs.

(iv) Arranging for the production of the Offering Circular, certificates, and such other documents as may be required from time to time.

(2) *Fiscal Agent.* SBA shall appoint a Fiscal Agent to:

(i) Establish performance criteria for Poolers.

(ii) Monitor and evaluate the financial markets to determine those factors that will minimize or reduce the cost of funding Debentures or Participating Securities.

(iii) Monitor the performance of the Selling Agent, Poolers, CRA, and the Trustee.

(iv) Perform such other functions as SBA, from time to time, may prescribe.

(3) *Central Registration Agent.* Pursuant to a contract entered into with SBA, the CRA, as SBA's agent, will do the following with respect to the Pools or Trust Certificates for the Debentures or Participating Securities:

(i) Form an SBA-approved Pool or Trust;

(ii) Issue the TCs in the form prescribed by SBA;

(iii) Transfer the TCs upon the sale of original issue TCs in any secondary market transaction;

(iv) Receive payments from Licensees;

(v) Make periodic payments as scheduled or required by the terms of the TCs, and pay all amounts required to be paid upon prepayment of Debentures or redemption of Participating Securities;

(vi) Hold, safeguard, and release all Debentures and Participating Securities constituting Trusts or Pools upon instructions from SBA;

(vii) Remain custodian of such other documentation as SBA shall direct by written instructions;

(viii) Provide for the registration of all pooled Debentures and Participating Securities, all Pools and Trusts, and all TCs;

(ix) Perform such other functions as SBA may deem necessary to implement the provisions of this section.

(b) *Functions.* The function of locating purchasers, and negotiating and closing the sale of Debentures, Participating Securities and TCs, may be performed either by SBA or an agent appointed by SBA. Nothing in the regulations in this part shall be interpreted to prevent the CRA from acting as SBA's agent for this purpose.

§ 107.1630 SBA regulation of Brokers and Dealers and disclosure to purchasers of Leverage or Trust Certificates.

(a) *Disclosure to purchasers.* Prior to any sale of a Debenture, Participating Security, or TC, SBA shall require the seller, or the broker or dealer as agent for the seller, to disclose to the purchaser, in a form prescribed or approved by SBA, specified information on the terms, conditions, and yield of such instrument.

(b) *Brokers and Dealers.* Each broker, dealer, and Pool or Trust assembler approved by SBA pursuant to these regulations shall either be regulated by a Federal financial regulatory agency, or be a member of the National Association of Securities Dealers (NASD), and shall be in good standing in respect to compliance with the financial, ethical, and reporting requirements of such body. They also shall be in good standing with SBA as determined by the SBA Associate Administrator for Investment (see paragraph (d) of this section) and shall provide a fidelity bond or insurance in such amount as SBA may require.

(c) *Suspension and/or termination of Broker or Dealer.* SBA shall exclude from the sale and all other dealings in Debentures, Participating Securities or TCs any broker or dealer:

(1) If such broker's or dealer's authority to engage in the securities business has been revoked or suspended by a supervisory agency. When such

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authority has been suspended, such broker or dealer will be suspended by SBA for the duration of such suspension by the supervisory agency.

(2) If such broker or dealer has been indicted or otherwise formally charged with a misdemeanor or felony bearing on its fitness, such broker or dealer may be suspended while the charge is pending. Upon conviction, participation may be terminated.

(3) If such broker or dealer has suffered an adverse final civil judgment, holding that such broker or dealer has committed a breach of trust or violation of law or regulation protecting the integrity of business transactions or relationships, participation in the market for Debentures, Participating Securities or TCs may be terminated.

(4) If such broker or dealer has failed to make full disclosure of the information required by SBA in paragraph (a) of this section, such broker's or dealer's participation in the market for Debentures, Participating Securities or TCs may be terminated.

(d) *Termination/suspension proceedings.* A broker's or dealer's participation in the market for Debentures, Participating Securities or TCs will be conducted in accordance with part 134 of this chapter. SBA may, for any of the reasons stated in paragraphs (b)(1) through (b)(4) of this section, suspend the privilege of any broker or dealer to participate in this market. SBA shall give written notice at least ten (10) business days prior to the effective date of such suspension. Such notice shall inform the broker or dealer of the opportunity for a hearing pursuant to part 134 of this chapter.

§ 107.1640 SBA access to records of the CRA, Brokers, Dealers and Pool or Trust assemblers.

The CRA and any broker, dealer and Pool or Trust assembler operating under the regulations in this part shall make all books, records and related materials associated with Debentures, Participating Securities and TCs available to SBA for review and copying purposes. Such access shall be at such

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party's primary place of business during normal business hours.

MISCELLANEOUS

§ 107.1700 Transfer by SBA of its interest in Licensee's Leverage security.

Upon such conditions and for such consideration as it deems reasonable, SBA may sell, assign, transfer, or otherwise dispose of any Preferred Security, Debenture, Participating Security, or other security held by or on behalf of SBA in connection with Leverage. Upon notice by SBA, Licensee will make all payments of principal, dividends, interest, Prioritized Payments, and redemptions as shall be directed by SBA. Licensee will be liable for all damage or loss which SBA may sustain by reason of such disposal, up to the amount of Licensee's liability under such security, plus court costs and reasonable attorney's fees incurred by SBA.

§ 107.1710 SBA authority to collect or compromise its claims.

SBA may, upon such conditions and for such consideration as it deems reasonable, collect or compromise all claims relating to Preferred or Participating Securities or obligations held or guaranteed by SBA, and all legal or equitable rights accruing to SBA.

§ 107.1720 Characteristics of SBA's guarantee.

If SBA agrees to guarantee a Licensee's Debentures or Participating Securities, such guarantee will be unconditional, irrespective of the validity, regularity or enforceability of the Debentures or Participating Securities or any other circumstances which might constitute a legal or equitable discharge or defense of a guarantor. Pursuant to its guarantee, SBA will make timely payments of principal and interest on the Debentures or the Redemption Price of and Prioritized Payments on the Participating Securities.

[63 FR 5873, Feb. 5, 1998]

Subpart J—Licensee's Noncompliance With Terms of Leverage**§ 107.1800 Licensee's agreement to terms and conditions in §§ 107.1810 and 107.1820.**

Any Licensee that violates the terms and conditions of its Leverage is subject to SBA remedies. The terms, conditions and remedies in § 107.1810 apply to outstanding Debentures issued after April 25, 1994. The terms, conditions and remedies in § 107.1820 apply to outstanding Preferred Securities and Participating Securities issued after April 25, 1994, or if you have Earmarked Assets in your portfolio.

§ 107.1810 Events of default and SBA's remedies for Licensee's noncompliance with terms of Debentures.

(a) *Applicability of this section.* This § 107.1810 applies to Debentures issued after April 25, 1994. By issuing such Debentures, you automatically agree to the terms, conditions and remedies in this section, as in effect at the time of issuance and as if fully set forth in the Debentures. Debentures issued before April 25, 1994 continue to be governed by the remedies in effect at the time of their issuance.

(b) *Automatic events of default.* The occurrence of one or more of the events in this paragraph (b) causes the remedies in paragraph (c) of this section to take effect immediately.

(1) *Insolvency.* You become equitably or legally insolvent.

(2) *Voluntary assignment.* You make a voluntary assignment for the benefit of creditors without SBA's prior written approval.

(3) *Bankruptcy.* You file a petition to begin any bankruptcy or reorganization proceeding, receivership, dissolution or other similar creditors' rights proceeding, or such action is initiated against you and is not dismissed within 60 days.

(c) *SBA remedies for automatic events of default.* Upon the occurrence of one or more of the events in paragraph (b) of this section:

(1) Without notice, presentation or demand, the entire indebtedness evidenced by your Debentures, including accrued interest, and any other amounts owed SBA with respect to

your Debentures, is immediately due and payable; and

(2) You automatically consent to the appointment of SBA or its designee as your receiver under section 311(c) of the Act.

(d) *Events of default with notice.* For any occurrence (as determined by SBA) of one or more of the events in this paragraph (d), SBA may avail itself of one or more of the remedies in paragraph (e) of this section.

(1) *Fraud.* You commit a fraudulent act which causes detriment to SBA's position as a creditor or guarantor.

(2) *Fraudulent transfers.* You make any transfer or incur any obligation that is fraudulent under the terms of 11 U.S.C. 548.

(3) *Willful conflicts of interest.* You willfully violate § 107.730.

(4) *Willful non-compliance.* You willfully violate one or more of the substantive provisions of the Act, specifically including but not limited to the provisions summarized in section 310(c) of the Act, or any substantive regulation promulgated under the Act.

(5) *Repeated Events of Default.* At any time after being notified by SBA of the occurrence of an event of default under paragraph (f) of this section, you engage in similar behavior which results in another occurrence of the same event of default.

(6) *Transfer of Control.* You violate § 107.475 and/or willfully violate § 107.410, and as a result of such violation you undergo a transfer of Control.

(7) *Non-cooperation under § 107.1810(h).* You fail to take appropriate steps, satisfactory to SBA, to accomplish any action SBA may have required under paragraph (h) of this section.

(8) *Non-notification of Events of Default.* You fail to notify SBA as soon as you know or reasonably should have known that any event of default exists under this section.

(9) *Non-notification of defaults to others.* You fail to notify SBA in writing within ten days from the date of a declaration of an event of default or non-performance under any note, debenture or indebtedness of yours, issued to or held by anyone other than SBA.

(e) *SBA remedies for events of default with notice.* Upon written notice to you of the occurrence (as determined by

SBA) of one or more of the events in paragraph (d) of this section:

(1) SBA may declare the entire indebtedness evidenced by your Debentures, including accrued interest, and/or any other amounts owed SBA with respect to your Debentures, immediately due and payable; and

(2) SBA may avail itself of any remedy available under the Act, specifically including institution of proceedings for the appointment of SBA or its designee as your receiver under section 311(c) of the Act.

(f) *Events of default with opportunity to cure.* For any occurrence (as determined by SBA) of one or more of the events in this paragraph (f), SBA may avail itself of one or more of the remedies in paragraph (g) of this section.

(1) *Excessive Management Expenses.* Without the prior written consent of SBA, you incur Management Expenses in excess of those permitted under § 107.520.

(2) *Improper Distributions.* You make any Distribution to your shareholders or partners, except with the prior written consent of SBA, other than:

(i) Distributions permitted under § 107.585;

(ii) Payments from Retained Earnings Available for Distribution based on either the shareholders' pro-rata interests or the provisions for profit distributions in your partnership agreement, as appropriate; and

(iii) Distributions by Participating Securities issuers as permitted under §§ 107.1540 through 107.1580.

(3) *Failure to make payment.* Unless otherwise approved by SBA, you fail to make timely payment of any amount due under any security or obligation of yours that is issued to, held or guaranteed by SBA.

(4) *Failure to maintain Regulatory Capital.* You fail to maintain the minimum Regulatory Capital required under these regulations or, without the prior written consent of SBA, you reduce your Regulatory Capital, except as permitted by §§ 107.585 and 107.1560 through 107.1580.

(5) *Capital Impairment.* You have a condition of Capital Impairment as determined under § 107.1830.

(6) *Cross-default.* An obligation of yours that is greater than \$100,000 be-

comes due or payable (with or without notice) before its stated maturity date, for any reason including your failure to pay any amount when due. This provision does not apply if you pay the amount due within any applicable grace period or contest the payment of the obligation in good faith by appropriate proceedings.

(7) *Nonperformance.* You violate or fail to perform one or more of the terms and conditions of any security or obligation of yours that is issued to, held or guaranteed by SBA, or of any agreement with or conditions imposed by SBA in its administration of the Act and the regulations promulgated under the Act.

(8) *Noncompliance.* Except as otherwise provided in paragraph (d)(5) of this section, SBA determines that you have violated one or more of the substantive provisions of the Act, specifically including but not limited to the provisions summarized in section 310(c) of the Act, or any substantive regulation promulgated under the Act.

(9) *Failure to maintain investment ratio.* You fail to maintain the investment ratio for Leverage in excess of 300 percent of Leverageable Capital (see §§ 107.1150(b)(2) and 107.1160(c)), if applicable to you, as of the end of each fiscal year. In determining whether you have maintained the ratio, SBA will disregard any prepayment, sale, or disposition of Venture Capital Financing, any increase in Leverageable Capital, and any receipt of additional Leverage, within 120 days prior to the end of your fiscal year.

(10) *Failure to maintain diversity.* You fail to maintain diversity between management and ownership as required by § 107.150, if applicable to you.

(g) *SBA remedies for events of default with opportunity to cure.* (1) Upon written notice to you of the occurrence (as determined by SBA) of one or more of the events of default in paragraph (f) of this section, and subject to the conditions in paragraph (g)(2) of this section:

(i) SBA may declare the entire indebtedness evidenced by your Debentures, including accrued interest, and/or any other amounts owed SBA with respect to your Debentures, immediately due and payable; and

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(ii) SBA may avail itself of any remedy available under the Act, specifically including institution of proceedings for the appointment of SBA or its designee as your receiver under section 311(c) of the Act.

(2) SBA may invoke the remedies in paragraph (g)(1) of this section only if:

(i) It has given you at least 15 days to cure the default(s); and

(ii) You fail to cure the default(s) to SBA's satisfaction within the allotted time.

(h) *Repeated non-substantive violations.* If you repeatedly fail to comply with one or more of the non-substantive provisions of the Act or any non-substantive regulation promulgated under the Act, SBA, after written notification to you and until you cure such condition to SBA's satisfaction, may deny you additional Leverage and/or require you to take such actions as SBA may determine to be appropriate under the circumstances.

(i) *Consent to removal of officers, directors, or general partners and/or appointment of receiver.* The Articles of any Licensee issuing Debentures after April 25, 1994 must include the following provisions as a condition to the purchase or guarantee by SBA of such Leverage. Upon the occurrence of any of the events specified in paragraphs (d)(1) through (d)(6) or (f)(1) through (f)(3) of this section as determined by SBA, SBA shall have the right, and your consent to SBA's exercise of such right:

(1) With respect to a Corporate Licensee, upon written notice, to require you to replace, with individuals approved by SBA, one or more of your officers and/or such number of directors of your board of directors as is sufficient to constitute a majority of such board; or

(2) With respect to a Partnership Licensee, upon written notice, to require you to remove the person(s) responsible for such occurrence and/or to remove the general partner of Licensee, which general partner shall then be replaced in accordance with Licensee's Articles by a new general partner approved by SBA; and/or

(3) With respect to either a Corporate or Partnership Licensee, to obtain the appointment of SBA or its designee as

your receiver under section 311(c) of the Act for the purpose of continuing your operations. The appointment of a receiver to liquidate a Licensee is not within such consent, but is governed instead by the relevant provisions of the Act.

§ 107.1820 Conditions affecting issuers of Preferred Securities and/or Participating Securities.

(a) *Applicability of this section.* This section applies if you have Preferred Securities issued after April 25, 1994, or if you issue Participating Securities or have Earmarked Assets in your portfolio. Your Articles must include the provisions of this § 107.1820 as a condition to SBA's purchase of Preferred Securities or guarantee of Participating Securities and for as long as you own Earmarked Assets. Preferred Securities issued before April 25, 1994 continue to be governed by the remedies in effect at the time of their issuance.

(b) *Removal Conditions.* Upon the occurrence (as determined by SBA) of any of the following conditions ("Removal Conditions"), SBA may avail itself of one or more of the remedies in paragraph (d) of this section:

(1) *Insolvency or extreme Capital Impairment.* You become equitably or legally insolvent, or have a Capital Impairment Percentage of 100 percent or more ("extreme Capital Impairment") and have not cured such Capital Impairment within the time limits set by SBA in writing. In this regard:

(i) You are not considered to have a condition of extreme Capital Impairment during the first eight years following your first issuance of Participating Securities.

(ii) This paragraph (b)(1) does not give you an additional opportunity to cure if you have already had an opportunity to cure your Capital Impairment under paragraph (e)(3) of this section.

(2) *Voluntary assignment.* You make a voluntary assignment for the benefit of creditors.

(3) *Bankruptcy.* You begin any bankruptcy or reorganization proceeding, receivership, dissolution or other similar creditors' rights proceeding, or such action is initiated against you and is not dismissed within 60 days.

(4) *Transfer of Control.* You violate § 107.475 and/or willfully violate § 107.410, and such violation results in a transfer of Control.

(5) *Fraud.* You commit a fraudulent act which causes serious detriment to SBA's position as a guarantor or investor.

(6) *Fraudulent transfers.* You make any transfer or incur any obligation that is fraudulent under the terms of 11 USC 548.

(c) *Contingent Removal Conditions.* Upon the occurrence (as determined by SBA) of any of the following conditions ("Contingent Removal Conditions"), SBA may avail itself of one or more of the remedies in paragraph (d) of this section, but only if you fail to remove the person(s) SBA identifies as responsible for such occurrence and/or cure such occurrence to SBA's satisfaction within a time period determined by SBA (but not less than 15 days):

(1) *Willful conflicts of interest.* You willfully violate § 107.730.

(2) *Willful or repeated noncompliance.* You willfully or repeatedly violate one or more of the substantive provisions of the Act, specifically including but not limited to the provisions summarized in section 310(c) of the Act, or any substantive regulation promulgated under the Act.

(3) *Failure to comply with restrictions under paragraph (f) of this section.* You fail to comply with the restrictions imposed by SBA under paragraph (f) of this section.

(d) *SBA remedies for Removal Conditions and Contingent Removal Conditions.* Upon the occurrence (as determined by SBA) of any Removal Condition, or any Contingent Removal Condition accompanied by your failure to act as set forth in paragraph (c) of this section, SBA has the following rights, and you consent to SBA's exercise of any or all of such rights:

(1) With respect to a Corporate Licensee, upon written notice, to require you to replace, with individuals approved by SBA, one or more of your officers and/or such number of directors as is sufficient to constitute a majority of your board of directors; or

(2) With respect to a Partnership Licensee, upon written notice, to require you to remove the person(s) responsible

for such occurrence and/or to remove your general partner, who shall then be replaced in accordance with your Articles by a new general partner approved by SBA; and/or

(3) With respect to either a Corporate or Partnership Licensee, to the appointment of SBA or its designee as your receiver under section 311(c) of the Act for the purpose of continuing your operations. The appointment of a receiver to liquidate a Licensee is not within such consent, but is governed instead by the relevant provisions of the Act.

(e) *Restricted Operations Conditions.* Upon the occurrence (as determined by SBA) of any of the following conditions ("Restricted Operations Conditions"), SBA may avail itself of any of the remedies in paragraph (f) of this section.

(1) *Removal Conditions or Contingent Removal Conditions.* Any condition occurs which is listed in paragraphs (b) or (c) of this section.

(2) *Failure to maintain Regulatory Capital.* You fail to maintain the minimum Regulatory Capital required by this part.

(3) *Capital or Liquidity Impairment.* You have a condition of Capital Impairment as determined under § 107.1830 or, if applicable, a condition of Liquidity Impairment as determined under § 107.1505, and you fail to cure the impairment within time limits set by SBA in writing.

(4) *Improper Distributions.* You make any Distribution to your shareholders or partners other than those permitted by §§ 107.585 and 107.1560 through 107.1580.

(5) *Excessive Management Expenses.* Without the prior written consent of SBA, you incur Management Expenses in excess of those permitted under § 107.520.

(6) *Failure to make payment.* You fail to pay any amounts due under Preferred Securities or required by §§ 107.1500 through 107.1590, unless otherwise permitted by SBA.

(7) *Noncompliance.* Except as otherwise provided for in paragraphs (c)(1) and (c)(2) of this section, SBA determines that you have failed to comply with one or more of the substantive

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provisions of the Act, specifically including but not limited to the provisions summarized in section 310(c) of the Act, or any substantive regulation promulgated under the Act.

(8) *Failure to maintain diversity.* You fail to maintain diversity between management and ownership as required by § 107.150, if applicable to you.

(9) *Failure to meet investment requirements.* You fail to make the amount of Equity Capital Investments required for Participating Securities (§ 107.1500(b)(4)), if applicable to you; or you fail to maintain as of the end of each fiscal year the investment ratios or amounts required for Leverage in excess of 300 percent of Leverageable Capital (§ 107.1160(c)) or Preferred Securities in excess of 100 percent of Leverageable Capital (§ 107.1160(d)), if applicable to you. In determining whether you have met the maintenance requirements in § 107.1160(c) or (d), SBA will disregard any prepayment, sale, or disposition of Venture Capital Financings, any increase in Leverageable Capital, and any receipt of additional Leverage, within 120 days prior to the end of your fiscal year.

(10) *Nonperformance.* You violate or fail to perform one or more of the terms and conditions of any Participating Security or Preferred Security or of any agreement with or condition imposed by SBA in its administration of the Act and the regulations promulgated thereunder.

(11) *Noncooperation under paragraph (g) of this section.* You fail to take appropriate steps, satisfactory to SBA, to accomplish such action as SBA may have required under paragraph (g) of this section.

(f) *SBA remedies for Restricted Operations Conditions.* Upon the occurrence of any Restricted Operations Condition, and until such condition(s) are cured to SBA's satisfaction within a time period determined by SBA (but not less than 15 days), upon written notice SBA shall have the following rights, and you consent to SBA's exercise of any or all of such rights:

(1) To prohibit you from making any additional investments except for investments under legally binding commitments you entered into before such notice and, subject to SBA's prior writ-

ten approval, investments that are necessary to protect your investments;

(2) Until all Leverage is redeemed and amounts due are paid, to prohibit Distributions by you to any party other than SBA, its agent or Trustee;

(3) To require all your commitments from investors to be funded at the earliest time(s) permitted in accordance with your Articles; and

(4) To review and re-determine your approved Management Expenses.

(g) *Repeated non-substantive violations.* If you repeatedly fail to comply with one or more of the non-substantive provisions of the Act or any non-substantive regulation promulgated thereunder, SBA, after written notification to you and until such condition is cured to SBA's satisfaction, will deny you additional Leverage and/or require you to take such actions as SBA may determine to be appropriate under the circumstances.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5873, Feb. 5, 1998]

COMPUTATION OF LICENSEE'S CAPITAL IMPAIRMENT

§ 107.1830 Licensee's Capital Impairment—definition and general requirements.

(a) *Applicability of this section.* This section applies to Leverage issued on or after April 25, 1994. For Leverage issued before April 25, 1994, you must comply with paragraphs (e) and (f) of this section and the Capital Impairment regulations in this part in effect when you issued your Leverage. For all Leverage issued, you must also comply with any contractual provisions to which you have agreed.

(b) *Significance of Capital Impairment condition.* If you have a condition of Capital Impairment, you are not in compliance with the terms of your Leverage. As a result, SBA has the right to impose the applicable remedies for noncompliance in §§ 107.1810(g) and 107.1820(f).

(c) *Definition of Capital Impairment condition.* You have a condition of Capital Impairment if your Capital Impairment Percentage, as computed in § 107.1840, exceeds:

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(1) For Section 301(d) Licensees, 75 percent.

(2) For Section 301(c) Licensees, the appropriate percentage from the following table:

MAXIMUM PERMITTED CAPITAL IMPAIRMENT PERCENTAGES FOR SECTION 301(C) LICENSEES

| If the percentage of equity capital investments (at cost) in your portfolio is: | And your ratio of outstanding leverage to leverageable capital is: | Then your maximum permitted capital impairment percentage is: |
|---|--|---|
| 67% | 100% or less | 70 |
| | Over 100% but not over 200% | 60 |
| | Over 200% | 50 |
| At least 40% but under 67% | 100% or less | 55 |
| | Over 100% but not over 200% | 50 |
| | Over 200% | 40 |
| Under 40% | 100% or less | 45 |
| | Over 100% but not over 200% | 40 |
| | Over 200% | 35 |

(d) *Phase-in of maximum permitted Capital Impairment Percentages for Section 301(c) Licensees.* If you are a Section 301(c) Licensee, regardless of your maximum permitted Capital Impairment Percentage under paragraph (c) of this section, you will not have a condition of Capital Impairment if:

(1) Your Capital Impairment Percentage does not exceed 50 percent; and

(2) You have not reached your first fiscal year end occurring after April 25, 1995.

(e) *Quarterly computation requirement and procedure.* You must determine whether you have a condition of Capital Impairment as of the end of each fiscal quarter. You must notify SBA promptly if you are capitally impaired.

(f) *SBA's right to determine Licensee's Capital Impairment condition.* SBA may make its own determination of your Capital Impairment condition at any time.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5873, Feb. 5, 1998]

§ 107.1840 Computation of Licensee's Capital Impairment Percentage.

(a) *General.* This section contains the procedures you must use to determine your Capital Impairment Percentage if you have outstanding Leverage issued after April 25, 1994. You must compare your Capital Impairment Percentage to the maximum permitted under § 107.1830(c) to determine whether you

have a condition of Capital Impairment.

(b) *Preliminary impairment test.* If you satisfy the preliminary impairment test, your Capital Impairment Percentage is zero and you do not have to perform any more procedures in this § 107.1840. Otherwise, you must continue with paragraph (c) of this section. You satisfy the test if the following amounts are both zero or greater:

(1) The sum of Undistributed Net Realized Earnings, as reported on SBA Form 468, and Includible Non-Cash Gains.

(2) Unrealized Gain (Loss) on Securities Held.

(c) *How to compute your Capital Impairment Percentage.* (1) If you have an Unrealized Gain on Securities Held, compute your Adjusted Unrealized Gain using paragraph (d) of this section. If you have an Unrealized Loss on Securities Held, continue with paragraph (c)(2) of this Section.

(2) Add together your Undistributed Net Realized Earnings, your Includible Non-cash Gains, and either your Unrealized Loss on Securities Held or your Adjusted Unrealized Gain.

(3) If the sum in paragraph (c)(2) of this section is zero or greater, your Capital Impairment Percentage is zero.

(4) If the sum in paragraph (c)(2) of this section is less than zero, drop the negative sign, divide by your Regulatory Capital (excluding Treasury Stock), and multiply by 100. The result

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is your Capital Impairment Percentage.

(d) *How to compute your Adjusted Unrealized Gain.* (1) Subtract Unrealized Depreciation from Unrealized Appreciation. This is your "Net Appreciation".

(2) Determine your Unrealized Appreciation on Publicly Traded and Marketable securities. This is your "Class 1 Appreciation".

(3) Determine your Unrealized Appreciation on securities that are not Publicly Traded and Marketable and meet the following criteria, which must be substantiated to the satisfaction of SBA (this is your "Class 2 Appreciation"):

(i) The Small Business that issued the security received a significant sub-

sequent equity financing by an investor whose objectives were not primarily strategic and at a price that conclusively supports the Unrealized Appreciation;

(ii) Such financing represents a substantial investment in the form of an arm's length transaction by a sophisticated new investor in the issuer's securities; and

(iii) Such financing occurred within 24 months of the date of the Capital Impairment computation, or the Small Business' pre-tax cash flow from operations for its most recent fiscal year was at least 10 percent of the Small Business' average contributed capital for such fiscal year.

(4) Perform the appropriate computation from the following table:

ADJUSTED UNREALIZED GAIN BEFORE ESTIMATED TAX EFFECTS

| If: | And: | Then adjusted unrealized gain before taxes is: |
|--|---|---|
| Class 1 Appreciation ≤ Net Appreciation. | Class 1 Appreciation + Class 2 Appreciation ≤ Net Appreciation. | (80% × Class 1 Appreciation) + (50% × Class 2 Appreciation). |
| Class 1 Appreciation ≤ Net Appreciation. | Class 1 Appreciation + Class 2 Appreciation > Net Appreciation. | (80% × Class 1 Appreciation) + [(50% × (Net Appreciation - Class 1 Appreciation))]. |
| Class 1 Appreciation > Net Appreciation. | ..... | 80% × Net Appreciation. |

(5) Reduce the gain computed in paragraph (d)(4) of this section by your estimate of related future income tax expense. Subject to any adjustment required by paragraph (d)(6) of this section, the result is your Adjusted Unrealized Gain for use in paragraph (c)(2) of this section.

(6) If any securities that are the source of either Class 1 or Class 2 Appreciation are pledged or encumbered in any way, you must reduce the Adjusted Unrealized Gain computed in paragraph (d)(5) of this section by the amount of the related borrowing or other obligation, up to the amount of the Unrealized Appreciation on the securities.

§ 107.1850 Exceptions to Capital Impairment provisions for Licensees with outstanding Participating Securities.

The provisions in this § 107.1850 apply only if at least two-thirds of your outstanding Leverage consists of Participating Securities, and at least two-

thirds of your Loans and Investments (at cost) consist of Equity Capital Investments.

(a) *Forbearance period for Participating Securities issuers.* During the first forty-eight (48) months following your first issuance of Participating Securities, you will not have a condition of Capital Impairment if your Capital Impairment Percentage is below 85 percent.

(b) *Extended forbearance period for early stage investors.* If at least two-thirds of your Loans and Investments (at cost) are in Start-Up Financings, the forbearance period in paragraph (a) of this section is extended to 60 months.

(c) *Forbearance based on actions by Licensee.* The provisions of this paragraph (c) apply only during the fifth and sixth years following your first issuance of Participating Securities. If your Capital Impairment Percentage, as determined either by you or by SBA, exceeds the maximum permitted under § 107.1830(c) but is below 85 percent, you

will not have a condition of Capital Impairment if you do either of the following within thirty (30) days of such determination:

(1) Increase your Regulatory Capital by a cash contribution placed in an escrow account or other account satisfactory to SBA, for its benefit. The contribution must equal, during the fifth year, 15 percent of your outstanding Leverage or, during the sixth year, 30 percent.

(2) Provide a guarantee, satisfactory to SBA and for its benefit, for the amount of the cash contribution required in paragraph (c)(1) of this section. SBA will credit any escrowed funds or guarantee received in the fifth year toward the requirements for the sixth year.

(d) *Conditions for forbearance under paragraph (c) of this section.* (1) You cannot count any funds placed in an escrow or other account under paragraph (c) of this section as Leverageable Capital.

(2) Any fee and/or any claim to repayment by the party making the capital contribution or by the guarantor must be deferred and subordinate to all outstanding Leverage plus any unpaid Earned Prioritized Payments and earned Adjustments.

(3) If there is an acceleration or mandatory redemption under §107.1810 or §107.1820, any funds in the escrow account and/or any guarantee received under paragraph (c) of this section will be applied toward repaying any amounts due SBA.

(4) If you reduce your Capital Impairment Percentage to zero, SBA will release and return any escrowed funds and/or any guarantee received under paragraph (c) of this section.

Subpart K—Ending Operations as a Licensee

§ 107.1900 Surrender of license.

You may not surrender your license without SBA's prior written approval. Your request for approval must be accompanied by an offer of immediate repayment of all of your outstanding Leverage (including any prepayment penalties thereon), or by a plan satisfactory to SBA for the orderly liquidation of the Licensee.

Subpart L—Miscellaneous

§ 107.1910 Non-waiver of SBA's rights or terms of Leverage security.

SBA's failure to exercise or delay in exercising any right or remedy under the Act or the regulations in this part does not constitute a waiver of such right or remedy. SBA's failure to require you to perform any term or provision of your Leverage does not affect SBA's right to enforce such term or provision. Similarly, SBA's waiver of, or failure to enforce, any term or provision of your Leverage or of any event or condition set forth in §107.1810 or §107.1820 does not constitute a waiver of any succeeding breach of such term or provision or condition.

§ 107.1920 Licensee's application for exemption from a regulation in this part 107.

You may file an application in writing with SBA to have a proposed action exempted from any procedural or substantive requirement, restriction, or prohibition to which it is subject under this part, unless the provision is mandated by the Act. SBA may grant an exemption for such applicant, conditionally or unconditionally, provided the exemption would not be contrary to the purposes of the Act. Your application must be accompanied by supporting evidence which demonstrates to SBA's satisfaction that:

(a) The proposed action is fair and equitable; and

(b) The exemption requested is reasonably calculated to advance the best interests of the SBIC program in a manner consonant with the policy objectives of the Act and the regulations in this part.

§ 107.1930 Effect of changes in this part 107 on transactions previously consummated.

The legality of a transaction covered by the regulations in this part is governed by the regulations in this part in effect at the time the transaction was consummated, regardless of later changes. Nothing in this part bars SBA enforcement action with respect to any transaction consummated in violation of provisions applicable at the time, but no longer in effect.

**PART 112—NONDISCRIMINATION
IN FEDERALLY ASSISTED PRO-
GRAMS OF SBA—EFFECTUATION
OF TITLE VI OF THE CIVIL RIGHTS
ACT OF 1964**

Sec.

- 112.1 Purpose.
- 112.2 Application of this part.
- 112.3 Discrimination prohibited.
- 112.4 Discrimination in employment.
- 112.5 Discrimination in providing financial assistance.
- 112.6 Discrimination in accommodations or services.
- 112.7 Illustrative applications.
- 112.8 Assurances required.
- 112.9 Compliance information.
- 112.10 Conduct of investigations.
- 112.11 Procedure for effecting compliance.
- 112.12 Effect on other regulations; forms and instructions.

APPENDIX A TO PART 112

AUTHORITY: Sec. 602, 78 Stat. 252 (42 U.S.C. 2000d-1).

SOURCE: 30 FR 298, Jan. 9, 1965, unless otherwise noted.

§ 112.1 Purpose.

The purpose of this part is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 (hereinafter referred to as the *Act*) to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any financial assistance activities of the Small Business Administration to which the Act applies.

§ 112.2 Application of this part.

(a) This part applies to all recipients of assistance under programs administered by the Small Business Administration. (See appendix A)

(b) The term *Federal financial assistance* includes: (1) Grants and loans of Federal funds; (2) the grant or donation of Federal property and interests in property; (3) the detail of Federal personnel; (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration, or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition

of the public interest to be served by such sale or lease to the recipient; and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(c) This part does not apply to financial assistance extended by way of insurance or guarantee.

(d) The terms *applicant* and *recipient* mean, respectively, one who applies for and one who receives any of the financial assistance under any of the statutes referred to in paragraph (a) of this section. The term *recipient* also shall be deemed to include *subrecipients* of SBA financial assistance, i.e., concerns which secondarily receive financial assistance from the primary recipients of such financial assistance.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973; 50 FR 1441 Jan. 11, 1985]

§ 112.3 Discrimination prohibited.

(a) *General.* To the extent that this part applies, no person in the United States shall, on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination by any business or other activity.

(b) *Specific discriminatory actions prohibited.* (1) To the extent that this part applies, a business or other activity may not, directly or through contractual or other arrangements, on ground of race, color or national origin:

(i) Deny an individual any services, financial aid or other benefit provided by the business or other activity;

(ii) Provide any service, financial aid or other benefit to an individual which is different or is provided in a different manner, from that provided to others by the business or other activity;

(iii) Subject an individual to segregation or separate treatment in any manner related to his receipt of any service, financial aid or other benefit from the business or other activity;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid or other benefit from the business or other activity;

(v) Treat an individual differently from others in determining whether he

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satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid or other benefit provided by the business or other activity.

(2) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

(3) This regulation does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where previous discriminatory practice or usage tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this regulation applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purposes of the Act.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973]

§ 112.4 Discrimination in employment.

Small business concerns and development companies which apply for or receive any financial assistance of the kind described in § 112.2(a) (1) and (2), including concerns which are identifiable beneficiaries of loans made under § 112.2(a)(2), may not discriminate on the grounds of race, color, or national origin in their employment practices. Such assistance is deemed to have as a primary objective the providing of employment. Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the grounds of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the

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benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions of § 112.7(a) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity and non-discriminatory treatment.

[38 FR 17934, July 5, 1973]

§ 112.5 Discrimination in providing financial assistance.

Development companies and small business investment companies which apply for or receive any of the financial assistance described in § 112.2(a) may not discriminate, on the ground of race, color or national origin, in providing financial assistance to small business concerns.

§ 112.6 Discrimination in accommodations or services.

Small business concerns which apply for or receive any financial assistance of the kind described in § 112.2(a)(1), concerns which are identifiable beneficiaries of loans made under § 112.2(a)(2), and physicians, hospitals, schools, libraries, and other individuals or organizations which apply for or receive financial assistance of the kind described in § 112.2(a)(5), may not discriminate in the treatment accommodations or services they provide to their patients, students, visitors, guests, members, passengers, or patrons in the conduct of such businesses or other enterprises, whether or not operated for profit.

[31 FR 2374, Feb. 4, 1966]

§ 112.7 Illustrative applications.

(a) *Employment.* The discrimination prohibited by § 112.4 includes but is not limited to any action (taken directly or through contractual or other arrangements) which subjects an individual to discrimination on the ground of race, color or national origin in any employment practice, including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities.

(b) *Financial assistance.* The discrimination prohibited by § 112.5 includes but is not limited to the failure or refusal, because of the race, color, or national origin of a person, to extend a loan or equity financing to him or to any business concern of which he is an owner or employee; or, in the case of financing which has actually been extended, the failure or refusal, because of the race, color, or national origin of the borrower or of an owner or employee of the borrower, to accord the borrower fair treatment and the customary courtesies regarding such matters as default, grace periods and the like.

(c) *Accommodations or services.* The discrimination prohibited by § 112.6 includes but is not limited to the failure or refusal, because of the race, color, or national origin of a person, to accept him on a nonsegregated basis as a patient, student, visitor, guest, member, customer, passenger or patron.

(d) *Affirmative action.* (1) In some situations even though past discriminatory practices have been abandoned, the consequences of such practices continue to impede the full availability of equal opportunity. If the efforts required of the applicant or recipient under § 112.3(b)(3) to provide information as to the availability of equal opportunity, and the rights of individuals under this regulation, have failed to overcome these consequences, it will become necessary for such applicant or recipient to take additional steps to make equal opportunity fully available to racial and nationality groups previously subjected to discrimination.

(2) Even though an applicant or recipient has never used discriminatory policies, the opportunities in the business it operates may not in fact be equally available to some racial or nationality groups. In such circumstances a recipient may properly give special consideration to race, color, or national origin to make opportunity more widely available to such groups.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973]

§ 112.8 Assurances required.

An application for any of the financial assistance described in § 112.2(a) shall, as a condition to its approval and

the extension of such assistance, contain or be accompanied by an assurance that the recipient will comply with this part. Such an assurance shall contain provisions authorizing the acceleration of the maturity of the recipient's financial obligation to the SBA in the event of a failure to comply, and provisions which give the United States a right to seek judicial enforcement of the terms of the assurance. SBA shall specify the form of the foregoing assurance for each program, and the extent to which like assurances will be required of contractors and subcontractors, transferees, successors in interest, and other participants in the program.

§ 112.9 Compliance information.

(a) *Cooperation and assistance.* SBA shall to the fullest extent practicable seek the cooperation of applicants and recipients in obtaining compliance with this part and shall provide assistance and guidance to applicants and recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each applicant or recipient shall keep such records and submit to SBA timely, complete and accurate compliance reports at such times, and in such form and containing such information, as SBA may determine to be necessary to enable SBA to ascertain whether the applicant or recipient has complied or is complying with this part. In the case of a small business concern which receives financial assistance from a development company or from a small business investment company, such concern shall submit to the company such information as may be necessary to enable the company to meet its reporting requirements under this part.

(c) *Access to sources of information.* Each applicant or recipient shall permit access by SBA during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of an applicant or recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information, the

applicant or recipient shall so certify in its report and shall set forth what efforts it has made to obtain this information.

(d) *Information to the public.* Each recipient shall make available to persons entitled under the Act and under this part to protection against discrimination by the recipient such information as SBA may find necessary to apprise them of their rights to such protection.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973]

§ 112.10 Conduct of investigations.

(a) *Periodic compliance reviews.* SBA shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may, by himself or by a representative, file with SBA a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by SBA.

(c) *Investigations.* SBA will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the applicant or recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the applicant or recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, SBA will so inform the applicant or recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 112.11.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, SBA will so inform the applicant or recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No applicant or recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or by this part or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973]

§ 112.11 Procedure for effecting compliance.

(a) *General.* (1) If there appears to be a failure or threatened failure to comply with this part and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by suspending, terminating, or refusing any financial assistance approved but not yet disbursed to an applicant or, in the case of a loan which has been partially disbursed, by refusing to make further disbursements. In addition, compliance may be effected by any other means authorized by law.

(2) Such other means may include but are not limited to (i) legal action by SBA to enforce its right, embodied in the assurances described in § 112.8, to accelerate the maturity of the recipient's obligation; (ii) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States, including other titles of the Act; and (iii) any applicable proceedings under State or local law.

(b) *Noncompliance with § 112.8.* If an applicant fails or refuses to furnish an assurance required under § 112.8 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. SBA shall not be required to

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provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that SBA shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part. Such proceedings shall be conducted in accordance with the provisions of part 134 of this chapter by an Administrative Law Judge of the Office of Hearings and Appeals, who shall issue an initial decision in the case. The Administrator shall be the reviewing official for purposes of § 134.228. The applicant's failure to file a timely motion in accordance with §§ 134.222 and 134.211, requesting that the matter be scheduled for an oral hearing, shall constitute waiver of the right to an oral hearing but shall not prevent the submission of written information and argument for the record in accordance with the provisions of part 134.

(c) *Conditions precedent.* No order suspending, terminating, or refusing financial assistance shall become effective until (1) SBA has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means; (2) there has been an express finding on the record after an opportunity for an oral hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part; (3) the initial decision has become final pursuant to § 134.227(b); and (4) the expiration of 30 days after SBA has filed with the committee of the House and the committee of the Senate having legislative jurisdiction of the form of financial assistance involved, a full written report of the circumstances and the grounds for such action.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) SBA has determined that compliance cannot be secured by voluntary means; (2) the action has been approved by the Administrator or his designee; (3) the applicant or recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and

(4) the expiration of at least 10 days from the mailing of such notice to the applicant or recipient or other person. During this period of at least 10 days from the mailing of such notice to the applicant or recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the applicant or recipient or other person to comply with this part and to take such corrective action as may be appropriate.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973; 49 FR 33629, Aug. 24, 1984; 61 FR 2691, Jan. 29, 1996]

§ 112.12 Effect on other regulations; forms and instructions.

(a) *Effect on other regulations.* All regulations, orders or like directions heretofore issued by SBA which impose requirements designed to prohibit any discrimination against individuals on the grounds of race, color, or national origin and which authorize the suspension or termination of or refusal to grant to or to continue financial assistance to any applicant for or recipient of such assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this part. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Order 11246 and regulations issued thereunder, or (2) any other orders, regulations or instructions, insofar as such order, regulations, or instructions prohibit discrimination on the grounds of race, color, or national origin in any program or situation to which this part is inapplicable or prohibit discrimination on any other ground.

(b) *Forms and instructions.* SBA shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The Administrator may from time to time assign to officials of SBA or to officials

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of other agencies of the Government with the consent of such agencies, responsibilities in connection with the effectuation of the purpose of Title VI of the Act and this part (other than responsibility for final decision as provided in §112.13), including the achievement of effective coordination and maximum uniformity within SBA and within the Executive Branch of the Government in the application of Title VI and this part to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the Administrator of SBA.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17935, July 5, 1973. Redesignated at 49 FR 33629, Aug. 24, 1984]

APPENDIX A TO PART 112

| Name of program | Authority |
|---|--|
| Financial Programs | |
| Regular business loans | Small Business Act, sec. 7(a) and 7(a)(11). |
| Handicapped assistance loans. | Small Business Act, sec. 7(a)(10) |
| Small business energy loans | Small Business Act, sec. 7(a)(12). |
| Small general contractors | Small Business Act, sec. 7(a)(9). |
| Vietnam-era and Disabled Veterans Loan Program. | Pub. L. 97-72. |
| Debtor State development company loans (501) and their small business concerns. | Small Business Investment Act, title V, and Small Business Act, sec. 7(a)(13). |
| Debtor small business investment companies and their small business concerns. | Small Business Investment Act, title III. |
| Disaster Loans | |
| Physical | Small Business Act, sec. 7(b)(1). |
| Economic injury (EIDL) | Small Business Act, sec. 7(b)(2). |
| Federal action—economic injury. | Small Business Act, sec. 7(b)(3). |
| Currency fluctuation—economic injury. | Small Business Act, sec. 7(b)(4). |
| Nonfinancial Programs | |
| Women's business enterprise | Executive Order 12138. |
| Small business innovation and research. | Small Business Act, sec. 9. |
| Procurement automated source system. | Small Business Act, sec. 8 and Pub. L. 96-302. |

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| Name of program | Authority |
|---|---|
| Business Development Program. | Small Business Act, sec. 8(a) and Pub. L. 95-507, as amended by Pub. L. 96-481. |
| Small Business Institute Program. | Small Business Act, sec. 8(b)(1) and Pub. L. 85-536. |
| Certificate of competency | Small Business Act, sec. 8(b)(7) and Pub. L. 95-89. |
| Subcontracting Assistance Program. | Small Business Act, sec. 8(d) and Pub. L. 95-507. |
| Technology Assistance Program. | Small Business Act, sec. 9. |
| Small business development centers. | Small Business Act, sec. 21 and Pub. L. 96-302. |
| International Trade Program | Small Business Act, sec. 22 and Pub. L. 96-481. |
| Service Corps of Retired Executives and Active Corps of Executives. | Small Business Act, secs. 101 and 8(b)(1) and Pub. L. 95-510. |
| Veterans affairs programs | Pub. L. 93-237. |
| Private sector initiatives | Small Business Act, sec. 8(b)(1). |

NOTE: All programs listed above are also covered by part 113 of title 13 of the Code of Federal Regulations.

[50 FR 1441, Jan. 11, 1985]

PART 113—NONDISCRIMINATION IN FINANCIAL ASSISTANCE PROGRAMS OF SBA—EFFECTUATION OF POLICIES OF FEDERAL GOVERNMENT AND SBA ADMINISTRATOR

Sec.

113.1 Purpose.

113.2 Definitions.

113.3 Discrimination prohibited.

113.3-1 Consideration of race, color, religion, sex, marital status, handicap, or national origin.

113.3-2 Accommodations to religious observance and practice.

113.3-3 Structural accommodations for handicapped clients.

113.4 Assurances required.

113.5 Compliance information.

113.6 Conduct of investigations.

113.7 Procedure for effecting compliance.

113.8 Effect on other regulations, forms and instructions.

APPENDIX A TO PART 113

AUTHORITY: Secs. 5, 308, 72 Stat. 385, 694, as amended; 15 U.S.C. 633, 634, 687, 1691; 20 U.S.C. 1681-1686; 29 U.S.C. 794.

SOURCE: 44 FR 20068, Apr. 4, 1979, unless otherwise noted.

§ 113.1 Purpose.

(a) Part 112 of this chapter, issued pursuant to Title VI of the Civil Rights

Act of 1964, prohibits discrimination on the basis of race, color, or national origin by some recipients of financial assistance from SBA. The purpose of this part is to reflect to the fullest extent possible the nondiscrimination policies of the Federal Government as expressed in the several statutes, Executive Orders, and messages of the President dealing with civil rights and equality of opportunity, and in the previous determination of the Administrator of the Small Business Administration that discrimination based on race, color, religion, sex, marital status, handicap or national origin shall be prohibited, to the extent that it is not prohibited by part 112 of this chapter, to all recipients of financial assistance from SBA.

(b) In accordance with Pub. L. 94-239, 15 U.S.C. 1691, cited as the Equal Credit Act Amendments of 1976, it is unlawful for any recipient creditor to discriminate against any applicant, with respect to any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, age: (*Provided*, the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

(c) It is the intention of the Administrator that the prohibitions in this part supplement those in part 112 of this chapter, that the two parts be read in *pari materia*, and that the procedures established herein be harmonized to the maximum extent feasible with those established in part 112 of this chapter.

§ 113.2 Definitions.

As used in this part:

(a) The term *Federal financial assistance* includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration, or at a nominal consideration, or at a consideration which is reduced for the purpose of as-

sisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(b) The terms *applicant* and *recipient* mean, respectively, one who applies for and one who receives any of the financial assistance under any of the statutes referred to in paragraph (a) of this section. The term *recipient* also shall be deemed to include *subrecipients* of SBA financial assistance, i.e., concerns which secondarily receive financial assistance from the primary recipients of such financial assistance. For the purposes of this part, a paragraph (b) lender (13 CFR 120.4(b)) shall be deemed a recipient of financial assistance.

(c) The term *religion* includes all aspects of religious observance and practice, as well as belief.

(d) The term *qualified handicapped person* means (1) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (2) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(e) The term *handicapped person*, as defined by the guideline set forth by the Department of Health, Education, and Welfare in § 85.31 of title 45 of the CFR (43 FR 2137, dated January 13, 1978), means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(f) As used in paragraph (e) of this section, the phrase:

(1) *Physical or mental impairment* means (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental

illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction and alcoholism.

(2) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means (i) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) has none of the impairments defined in paragraph (f)(1) of this section but is treated by a recipient as having such an impairment.

(g) The term *reasonable accommodation* as used in these Regulations may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons; and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(h) The term *facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property.

[44 FR 20068, Apr. 4, 1979, as amended at 48 FR 14891, Apr. 6, 1983]

§ 113.3 Discrimination prohibited.

To the extent not covered or prohibited by part 112 of this chapter, recipients of financial assistance may not:

(a) Discriminate with regard to goods, services, or accommodations offered or provided by the aided business or other enterprise, whether or not op-

erated for profit, because of race, color, religion, sex, handicap, or national origin of a person, or fail or refuse to accept a person on a nonsegregated basis as a patient, student, visitor, guest, customer, passenger, or patron.

(b) With regard to employment practices within the aided business or other enterprise, whether or not operated for profit; fail or refuse, because of race, color, religion, sex or national origin of a person, to seek or retain the person's services, or to provide the person with opportunities for advancement or promotion, or accord an employee the rank and rate of compensation, including fringe benefits, merited by the employee's services and abilities.

(c) With regard to employment practices within the aided business or other enterprise, whether or not operated for profit; discriminate against a qualified handicapped person; or because of handicap, fail or refuse to seek or retain the person's services or to provide the person with opportunities for advancement or promotion, or accord an employee the rank and rate of compensation, including fringe benefits, merited by the employee's services and abilities. All employment decisions shall be made in a manner which ensures that discrimination on the basis of handicap does not occur. Such decisions may not limit, segregate, or classify job applicants or employees in any way that adversely affects the opportunities or status of qualified handicapped individuals.

(d) Participate in a contractual or other relationship that has the effect of subjecting job applicants or employees to discrimination prohibited by this part. The relationships referred to in this paragraph include those with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs. Activities covered by this part are as follows:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

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(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(e) Use employment tests or criteria that discriminate on the basis of race, color, religion, sex, marital status, handicap, or national origin. Employment tests which are used for all other job applicants shall be adapted in an appropriate mode for use by persons who have handicaps that impair sensory, manual, or speaking skills.

(f) Conduct a preemployment medical examination, unless required of all job applicants, and subsequent to a conditional offer of employment. The results of all such medical examinations shall be kept confidential.

(g) Make a preemployment inquiry as to whether a job applicant is a handicapped person or as to the nature or severity of a handicap: EXCEPT when a recipient is taking remedial action to overcome the effects of conditions which resulted in past discrimination, or when a recipient is taking affirmative action pursuant to section 503 of the Rehabilitation Act of 1973, as amended.

(1) Such preemployment inquiry may only be made after the job applicant has been informed that such disclosure is for the purposes set forth in paragraph (g) of this section; that the disclosure is voluntary and will be kept confidential; and that refusal of the job applicant to provide such information will not subject the applicant to any adverse action.

(2) Information elicited from qualified handicapped job applicants concerning their medical history or condition shall be kept confidential EXCEPT that:

(i) Supervisors and managers may be informed about restrictions on or accommodations to be made for the qualified handicapped individual;

(ii) First aid and safety personnel may be informed, where appropriate, of the need for possible emergency treatment; and

(iii) Compliance officials shall be given relevant information, if requested.

(h) Discriminate on the basis of race, color, religion, handicap or national origin in the use of toilets or any facilities for rest or comfort. Discriminate on the basis of race, color, religion, sex, handicap or national origin in the use of cafeterias, recreational programs or other programs sponsored by the applicant or recipient.

(i) With regard to all recipients offering credit, such as Small Business Investment Companies and Community Development Companies, discriminate against debtors on the basis of race, color, religion, sex, marital status, handicap, or national origin.

(j) With regard to the granting of credit by all recipient creditors, discriminate against any credit applicant, with respect to any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, handicap, age (provided the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

§ 113.3-1 Consideration of race, color, religion, sex, marital status, handicap, or national origin.

(a) This regulation does not prohibit the consideration of race, color, religion, sex, marital status, handicap, or national origin if the purpose and effect are to remove or overcome the

consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, religion, sex, marital status, handicap, or national origin. Where previous discriminatory practices or usage tends, on the grounds of race, color, religion, sex, marital status, handicap, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this regulation applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purposes of this regulation. All programs and activities shall be administered in the most integrated setting possible.

(b) Nothing in this part shall prohibit the restriction of certain jobs to members of one sex if a bona fide occupational qualification can be demonstrated by the applicant or recipient. Custom or tradition is not a bona fide occupational qualification.

(c) Recipients shall take steps to ensure that communications with job applicants and employees who have vision and/or hearing disabilities are available in appropriate modes.

(d) Recipients shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped job applicant or employee UNLESS the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Factors to be considered in determining whether an accommodation would impose an undue hardship on the operation of a recipient's business include:

(1) The overall size of the recipient's business with respect to number of employees, number and type of facilities, size of budget, and the financial condition of the business;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(e) Such accommodation may include making facilities used by employees readily accessible to and usable by handicapped persons, job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(f) The final decision, when making a review or investigation of a complaint, as to whether an accommodation would impose an undue hardship on the operation of a recipient business will be made by the compliance officials of the Small Business Administration.

(g) Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons, and shall not participate in a contractual relationship that has the effect of subjecting qualified handicapped job applicants or employees to discrimination prohibited by this part. The relationships referred to in this paragraph include those with referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

(h) Nothing in this part shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities.

§ 113.3-2 Accommodations to religious observance and practice.

A recipient of financial assistance must accommodate to the religious observances and practices of an employee or prospective employee unless the recipient demonstrates that it is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. As part of this obligation, recipient must make reasonable accommodations to the religious observances and practices of an employee or prospective employee who

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regularly observes Friday evening and Saturday, or some other day of the week, as Sabbath and/or who observes certain religious holidays during the year and who is conscientiously opposed to performing work or engaging in similar activity on such days, when such accommodations can be made without undue hardship on the conduct of the employer's business. In determining the extent of a recipient's obligations under this section, at least the following factors should be considered: (a) Business necessity, (b) financial costs and expenses, and (c) resulting personnel problems.

§ 113.3-3 Structural accommodations for handicapped clients.

(a) *Existing facilities.* Recipients in preexisting structures shall make their goods or services accessible to and usable by handicapped clients. Where structural changes are necessary to make the recipient's goods or services accessible, such changes shall be made as soon as practicable, but in no event later than three years after the effective date of this Regulation. A plan setting forth the steps necessary to complete such structural changes shall be developed and submitted to SBA. If practical, interested persons, including handicapped persons or organizations representing handicapped persons, will be consulted.

(b) *Design, construction, and alteration.* New facilities shall be designed and constructed to be readily accessible to and usable by persons with handicaps. Alterations to existing facilities that affect usability shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or

greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[44 FR 20068, Apr. 4, 1979, as amended at 45 FR 81734, Dec. 12, 1980; 55 FR 52138, 52140, Dec. 19, 1990]

§ 113.4 Assurances required.

An application for financial assistance shall, as a condition to its approval and the extension of such assistance, contain or be accompanied by an assurance that the recipient will comply with this part. Such an assurance shall contain provisions authorizing the acceleration of the maturity of the recipient's financial obligations to SBA in the event of a failure to comply, and provisions which give the United States a right to seek judicial enforcement of the terms of the assurance. SBA shall specify the form of the foregoing assurance for each program, and the extent to which like assurances will be required of contractors and subcontractors, transferees, successors in interest, and other participants in the program.

§ 113.5 Compliance information.

(a) *Cooperation and assistance:* SBA shall to the fullest extent practicable seek the cooperation of applicants and recipients in obtaining compliance with this part and shall provide assistance and guidance to applicants and recipients to help them comply voluntarily with this part. Recipients are expected to continually evaluate their compliance status, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons.

(b) *Compliance reports:* Each applicant or recipient shall keep such records

and submit to SBA timely, complete and accurate compliance reports at such times, and in such form and containing such information, as SBA may determine to be necessary to enable SBA to ascertain whether the applicant or recipient has complied or is complying with this part. In the case of a small business concern which receives financial assistance from a development company or from a small business investment company, such concern shall submit to the company such information as may be necessary to enable the company to meet its reporting requirements under this part.

(c) *Access to sources of information:* Each applicant or recipient shall permit access by SBA during normal business hours to such of its books, records, accounts and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of an applicant or recipient is in the exclusive possession of any other agency, institution or person; and such agency, institution or person shall fail or refuse to furnish this information, the applicant or recipient shall so certify in its report and shall set forth what efforts it has made to obtain this information.

(d) *Information to the Public.* Each recipient shall make available to persons entitled under this part to protection against discrimination by the recipient such information as SBA may find necessary to apprise them of their rights to such protection.

(1) In some situations even though past discriminatory practices have been abandoned, the consequences of such practices continue to impede the full availability of equal opportunity. If the efforts required of the applicant or recipient under § 113.5(b) to provide information as to the availability of equal opportunity, and the rights of individuals under this regulation, have failed to overcome these consequences, it will become necessary for such applicant or recipient to take additional steps to make equal opportunity fully available to racial, qualified handicapped, nationality groups and persons who because of their sex were previously subjected to discrimination.

(2) Even though an applicant or recipient has never used discriminatory policies, the opportunities in the business it operates may not in fact be equally available to some racial, qualified handicapped, or nationality groups. In such circumstances a recipient may properly give special consideration to race, color, religion, sex, marital status, qualified handicap or national origin to make the opportunities more widely available to such groups.

§ 113.6 Conduct of investigations.

(a) *Periodic compliance reviews.* SBA shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes that he, she or any class of individuals has been subjected to discrimination prohibited by this part may, personally or through a representative, file with SBA a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by SBA.

(c) *Investigations.* SBA will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the applicant or recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the applicant or recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, SBA will so inform the applicant or recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 113.7.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, SBA will so inform the applicant or recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No applicant or recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this part or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

§ 113.7 Procedure for effecting compliance.

(a) *General.* (1) If there appears to be a failure or threatened failure to comply with this part and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by suspending, terminating, or refusing any financial assistance approved but not yet disbursed to an applicant. In the case of loans partially or fully disbursed, compliance with this part may be effected by calling, canceling, terminating, accelerating repayment, or suspending in whole or in part the financial assistance provided. In addition compliance may be effected by any other means authorized by law.

(2) Such other means may include but are not limited to (i) legal action by SBA to enforce its rights, embodied in the assurances described in § 113.4; (ii) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States; and (iii) any applicable proceedings under State or local law.

(b) *Noncompliance with § 113.4.* If an applicant fails or refuses to furnish an assurance required under § 113.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. SBA shall not be required to provide assistance in such a case dur-

ing the pendency of the administrative proceedings under such paragraph except that SBA shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part. Such proceedings shall be conducted in accordance with the provisions of part 134 of this chapter by an Administrative Law Judge of the Office of Hearings and Appeals, who shall issue an initial decision in the case. The Administrator shall be the reviewing official for purposes of § 134.228. The applicant's failure to file a timely motion in accordance with §§ 134.222 and 134.211, requesting that the matter be scheduled for an oral hearing, shall constitute waiver of the right to an oral hearing but shall not prevent the submission of written information and argument for the record in accordance with the provisions of part 134.

(c) *Condition precedent.* Under this part 113, no order suspending, terminating, refusing, calling, canceling, or accelerating repayment of financial assistance in whole or in part shall become effective until (1) SBA has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means; (2) there has been an express finding on the record after an opportunity for an oral hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part; and (3) the initial decision has become final pursuant to § 134.227(b).

(d) Other means authorized by law. No action to effect compliance by any other means authorized by law shall be taken until:

(1) SBA has determined that compliance cannot be secured by voluntary means.

(2) The action has been approved by the Administrator or the Administrator's designee.

(3) The applicant or recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance.

(4) The expiration of at least 10 days from the mailing of such notice to the applicant or recipient or other person.

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During this period of at least 10 days, additional efforts shall be made to persuade the applicant or recipient or other person to comply with this part and to take such corrective action as may be appropriate.

[44 FR 20068, Apr. 4, 1979, as amended at 49 FR 33629, Aug. 24, 1984; 61 FR 2691, Jan. 29, 1996]

§ 113.8 Effect on other regulations, forms and instructions.

(a) *Effect on other regulations.* All regulations, orders of like directions heretofore issued by SBA which impose requirements designed to prohibit any discrimination against individuals on the grounds of race, color, religion, sex, handicap, marital status, age, or national origin and which authorize the suspension or termination of a refusal to grant to or to continue financial assistance to any applicant for or recipient of such assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction or like direction prior to the effective date of this part.

(b) *Forms and instructions.* SBA shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The Administrator may from time-to-time assign to officials of SBA or to officials of other agencies of the Government, with the consent of such agencies, responsibilities in connection with the effectuation of the purposes of this part (other than responsibility of first decisions as provided in § 113.9) including the achievement of effective coordination and maximum uniformity within SBA and within the executive branch of the Government in the application of this part and of comparable regulations issued by other agencies of the Government to similar situations. Any action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of re-

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sponsibility under this subsection shall have the same effect as though such action had been taken by the Administrator of SBA.

[44 FR 20068, Apr. 4, 1979. Redesignated at 49 FR 33629, Aug. 24, 1984]

APPENDIX A TO PART 113

| Name of program | Authority |
|---|---|
| Financial Programs | |
| Regular business loans | Small Business Act, sec. 7(a). |
| Handicapped assistance loans. | Small Business Act, sec. 7(a)(10). |
| Small business energy loans | Small Business Act, sec. 7(a)(12). |
| Small general contractors loans. | Small Business Act, sec. 7(a)(9). |
| Export revolving line of credit | Small Business Act, sec. 7(a)(14). |
| Vietnam-era and Disabled Veterans Loan Program. | Pub. L. 97–72. |
| Debtor State development company loans (501) and their small business concerns. | Small Business Investment Act, Title V and Small Business Act, sec. 7(a)(13). |
| Debtor State and local development company loans (502) and their small business concerns. | Small Business Investment Act, Title V and Small Business Act, sec. 7(a)(13). |
| Debtor certified development companies (503) and their small business concerns. | Small Business Investment Act, Title V and Small Business Act, sec. 7(a)(13). |
| Debtor small business investment companies and their small business concerns. | Small Business Investment Act, Title III. |
| Pollution Control | Small Business Investment Act, Title IV, Part A. |
| Surety bond guarantees | Small Business Investment Act, Title IV, Part B. |
| Lease guarantees (not funded) disaster loans. | Small Business Investment Act, Title IV. |
| Physical | Small Business Act, sec. 7(b)(1). |
| Economic injury (EIDL) | Small Business Act, sec. 7(b)(2). |
| Federal action—economic injury. | Small Business Act, sec. 7(b)(3). |
| Currency fluctuation—economic injury. | Small Business Act, sec. 7(b)(4). |
| Nonfinancial Programs | |
| Women's business enterprise | Executive Order 12138. |
| Small business innovation and research. | Small Business Act, sec. 9. |
| Procurement automated source system.. | Small Business Act, sec. 8 and Pub. L. 96–302. |
| Business Development Program. | Small Business Act, sec. 8(a) and Pub. L. 95–507, as amended by Pub. L. 96–481. |
| Small Business Institute | Small Business Act, sec. 8(b)(1). |
| Certificate of competency | Small Business Act, sec. 8(b)(7) and Pub. L. 95–89. |
| Subcontracting Assistance Program. | Small Business Act, sec. 8(d) and Pub. L. 95–507. |
| Technology Assistance Program. | Small Business Act, sec. 9. |

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| Name of program | Authority |
|---|---|
| Small business development centers. | Small Business Act, sec. 21 and Pub. L. 96-302. |
| International Trade Program | Small Business Act, sec. 22 and Pub. L. 96-481. |
| Service Corps of Retired Executives and Active Corps of Executives. | Small Business Act, secs. 101 and 8(b)(1) and Pub. L. 95-510. |
| Veterans Affairs Programs | Pub. L. 93-237. |
| Private sector initiatives | Small Business Act, sec. 8(b)(1). |

[50 FR 1442, Jan. 11, 1985]

PART 114—ADMINISTRATIVE CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT AND REPRESENTATION AND INDEMNIFICATION OF SBA EMPLOYEES

Subpart A—Administrative Tort Claims

Sec.

- 114.100 Definitions.
- 114.101 What do these regulations cover?
- 114.102 When, where and how do I present a claim?
- 114.103 Who may file a claim?
- 114.104 What evidence and information may SBA require relating to my claim?
- 114.105 Who investigates and considers my claim?
- 114.106 What if my claim exceeds \$5,000?
- 114.107 What if my claim exceeds \$25,000 or has other special features?
- 114.108 What if my claim is approved?
- 114.109 What if my claim is denied?

Subpart B—Representation and Indemnification of SBA Employees

- 114.110 What is SBA's policy with respect to indemnifying and providing legal representation to SBA employees?
- 114.111 Does the attorney-client privilege apply when SBA employees are represented by the Government?

AUTHORITY: 15 U.S.C. 634 (b)(1), (b)(6); 28 U.S.C. 2672; 28 CFR 14.11.

SOURCE: 61 FR 2401, Jan. 26, 1996, unless otherwise noted.

Subpart A—Administrative Tort Claims

§ 114.100 Definitions.

As used throughout this part 114, *date of accrual* means the date you know or reasonably should have known of your injury. The date of accrual will depend on the facts of each case. *Site* means the geographic location where the inci-

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dent giving rise to your claim occurred.

§ 114.101 What do these regulations cover?

This part applies only to monetary claims you assert under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, for injury to or loss of property, personal injury, or death arising from the negligent or wrongful act or omission of any SBA employee acting within the scope of his or her employment.

§ 114.102 When, where and how do I present a claim?

(a) *When.* You must present your claim within 2 years of the date of accrual.

(b) *Where.* You may present your claim at the SBA District Office nearest to the site of the action giving rise to the claim and within the same state as the site. If your claim is based on the acts or omissions of an employee of SBA's Disaster Assistance Program, you may present your claim either to the appropriate SBA District Office or to the Disaster Assistance Office nearest to the site of the action giving rise to the claim.

(c) *How.* You must use an official form which can be obtained from the SBA office where you file the claim or give other written notice of your claim, stating the specific amount of your alleged damages and providing enough information to enable SBA to investigate your claim. You may present your claim in person or by mail, but your claim will not be considered presented until SBA receives the written information.

[64 FR 40283, July 26, 1999]

§ 114.103 Who may file a claim?

(a) If a claim is based on factors listed in the first column, then it may be presented by persons listed in the second column.

| Claim factors | Claim presenters |
|-----------------------------------|---|
| Injury to or loss of property ... | The owner of the property, his or her duly authorized agent, or legal representative. |
| Personal injury | The injured person, his or her duly authorized agent, or legal representative. |

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| Claim factors | Claim presenters |
|--|---|
| Death | The executor, administrator, or legal representative of the decedent's estate, or any other person entitled to assert the claim under applicable state law. |
| Loss wholly compensated by an insurer with rights as a subrogee. | The parties individually, as their interests appear, or jointly. |

(b) An agent or legal representative may present your claim in your name, but must sign the claim, state his or her title or legal capacity, and include documentation of authority to present the claim on your behalf.

§ 114.104 What evidence and information may SBA require relating to my claim?

(a) For a claim based on injury to or loss of property:

- (1) Proof you own the property.
- (2) A specific statement of the damage you claim with respect to each item of property.
- (3) Itemized receipts for payment for necessary repairs or itemized written estimates of the cost of such repairs.
- (4) A statement listing date of purchase, purchase price and salvage value, where repair is not economical.
- (5) Full information about potential insurance coverage and any insurance claims or payments relating to your claim.
- (6) Any other information that may be relevant to the government's alleged liability or the damages you claim.

(b) For a claim based on personal injury, including pain and suffering:

- (1) A written report from your health care provider stating the nature and extent of your injury and treatment, the degree of your temporary or permanent disability, your prognosis, period of hospitalization, and any diminished earning capacity.
- (2) A written report following a physical, dental or mental examination of you by a physician employed by SBA or another Federal Agency. If you want a copy of this report, you must request it in writing, furnish SBA with the written report of your health care provider, if SBA requests it, and make or agree to make available to SBA any other medical reports relevant to your claim.

(3) Itemized bills for medical, dental and hospital expenses you have incurred, or itemized receipts of payment for these expenses.

(4) Your health care provider's written statement of the expected expenses related to any necessary future treatment.

(5) A statement from your employer showing actual time lost from employment, whether you are a full or part-time employee, and the wages or salary you actually lost.

(6) Documentary evidence showing the amount of earnings you actually lost if you are self-employed.

(7) Information about the existence of insurance coverage and any insurance claims or payments relating to the claim in question.

(8) Any other information that may be relevant to the government's alleged liability or the damages you claim.

(c) For a claim based on death:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Evidence of decedent's employment or occupation at the time of death, including monthly or yearly salary or earnings, and the duration of such employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent upon the decedent for support at the time of his or her death.

(4) Evidence of the support provided by the decedent to each dependent survivor at the time of his or her death.

(5) A summary of the decedent's general physical and mental condition before death.

(6) Itemized bills or receipts for payments for medical and burial expenses.

(7) For pain and suffering damage claims, a physician's detailed statement specifying the injuries suffered, the duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injury and death.

(8) Any other information that may be relevant to the government's alleged liability or the damages claimed.

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§ 114.105 Who investigates and considers my claim?

(a) SBA may investigate, or ask another Federal agency to investigate, your claim. SBA also may request any Federal agency to conduct a physical examination of you and provide a report to SBA. SBA will reimburse the Federal agency for the costs of that examination when authorized or required by statute or regulation.

(b) In those cases in which SBA investigates your claim, and which arise out of the acts or omissions of employees other than employees of the Disaster Assistance Program, the SBA District Counsel in the office with jurisdiction over the site where the action giving rise to the claim occurred will investigate and make recommendations or determination with respect to your claim. In those cases in which SBA investigates your claim, and which arise out of acts or omissions of Disaster Assistance Program employees, the SBA Disaster Area Counsel in the office with jurisdiction over the site where the action giving rise to the claim occurred will investigate and make recommendations or a determination with respect to your claim. The District Counsel, or Disaster Area Counsel, where appropriate, may negotiate with you, and is authorized to use alternative dispute resolution mechanisms, which are non-binding on SBA, when they may promote the prompt, fair and efficient resolution of your claim.

(c) If your claim is for \$5,000 or less, the District Counsel or Disaster Area Counsel who investigates your claim may deny the claim, or may recommend approval, compromise, or settlement of the claim to the Associate General Counsel for Litigation, who will in such a case take final action.

[61 FR 2401, Jan. 26, 1996, as amended at 64 FR 40283, July 26, 1999]

§ 114.106 What if my claim exceeds \$5,000?

The District Counsel or Disaster Area Counsel, as appropriate, must review and investigate your claim and forward it with a report and recommendation to the Associate General Counsel for Litigation, who may approve or deny an award, compromise,

or settlement of claims in excess of \$5,000, but not exceeding \$25,000.

[64 FR 40283, July 26, 1999]

§ 114.107 What if my claim exceeds \$25,000 or has other special features?

(a) The U.S. Attorney General or designee must approve in writing any award, compromise, or settlement of a claim in excess of \$25,000. For this purpose, a principal claim and any derivative or subrogated claim are considered a single claim.

(b) SBA must consult with the Department of Justice before adjusting, determining, compromising, or settling a claim whenever the General Counsel or designee determines:

(1) The claim involves a new precedent or a new point of law; or

(2) The claim involves or may involve a question of policy; or

(3) The United States is or may be entitled to indemnity or contribution from a third party and SBA is unable to adjust the third party claim; or

(4) Approval of a claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed \$25,000.

(c) SBA must consult with the Department of Justice before adjusting, determining, compromising, or settling a claim whenever SBA learns that the United States, or any of its employees, agents, or cost-plus contractors, is involved in litigation based on a claim arising out of the same incident or transaction.

(d) SBA, acting through its General Counsel or designee, must make any referrals to the Department of Justice for approval or consultation by transmitting them in writing to the Assistant Attorney General, Civil Division.

(1) The referral must contain a short and concise statement of the facts and the reason for the request or referral, copies of the relevant portions of the claim file, and SBA's views and recommendations.

(2) SBA may make this referral at any time after a claim is presented.

§ 114.108 What if my claim is approved?

SBA will notify you in writing if it approves your claim. The District

Counsel or Disaster Area Counsel investigating your claim will forward to you, your agent or legal representative the forms necessary to indicate satisfaction of your claim and your acceptance of the payment. Acceptance by you, your agent or your legal representative of any award, compromise or settlement releases all your claims against the United States under the Federal Tort Claims Act. This means that it binds you, your agent or your legal representative, and any other person on whose behalf or for whose benefit the claim was presented. It also constitutes a complete release of your claim against the United States and its employees. If you are represented by counsel, SBA will designate you and your counsel as joint payees and will deliver the check to counsel. Payment is contingent upon the waiver of your claim and is subject to the availability of appropriated funds.

[64 FR 40283, July 26, 1999]

§ 114.109 What if my claim is denied?

SBA will notify you or your agent or legal representative in writing by certified or registered mail if it denies your claim. You have a right to file suit in an appropriate U.S. District Court not later than six months after the date the notification was mailed.

Subpart B—Representation and Indemnification of SBA Employees

§ 114.110 What is SBA's policy with respect to indemnifying and providing legal representation to SBA employees?

(a) If an SBA employee engages in conduct, within the scope of his or her employment, which gives rise to a claim, and the SBA Administrator or designee determines that any of the following actions relating to the claim are in SBA's interest, SBA may:

(1) Indemnify the employee after a verdict, judgment, or other monetary award is rendered personally against the employee in any civil suit in state or federal court or any arbitration proceeding;

(2) Settle or compromise the claim; and/or

(3) Pay for, or request that the Department of Justice provide, legal rep-

resentation to the employee once personally named in such a suit.

(b) If you are an SBA employee, you may ask SBA to settle or compromise your claim, provide you with legal representation, or provide you with indemnification for a verdict, judgment or award entered against you in a suit. To do so, you must submit a timely, written request to the General Counsel, with appropriate documentation, including copies of any pleadings, verdict, judgment, award, or settlement proposal. The General Counsel will decide all requests for representation or settlement, and will forward to the Administrator, with the accompanying documentation and a recommendation, any requests for indemnification.

(c) Any payments by SBA under this section will be contingent upon the availability of appropriated funds.

§ 114.111 Does the attorney-client privilege apply when SBA employees are represented by the Government?

When attorneys employed by SBA participate in any process in which SBA seeks to determine whether SBA should request the Department of Justice to provide representation to an SBA employee sued, subpoenaed, or charged in his or her individual capacity, or whether attorneys employed by SBA should provide representational assistance for such an employee, those attorneys undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. If representation is authorized, SBA attorneys who assist in the representation of an SBA employee also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Unless authorized by the employee, the attorney must not disclose to anyone other than attorneys also responsible for the employee's representation information communicated to the attorney by the client-employee during the course of the attorney-client relationship. The attorney-client privilege will continue with respect to that information whether or not representation is provided, and even if the employee's representation is denied or discontinued.

PART 115—SURETY BOND GUARANTEE

Sec.

- 115.1 Overview of regulations.
- 115.2 Savings clause.

Subpart A—Provisions for All Surety Bond Guarantees

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AUTHORITY: 5 U.S.C. app 3; 15 U.S.C. 687b, 687c, 694a, 694b; Pub. L. 101-574, 104 Stat. 2823 (1990); Pub. L. 105-135.

SOURCE: 61 FR 3271, Jan. 31, 1996, unless otherwise noted.

§ 115.1 Overview of regulations.

The regulations in this part cover the SBA's Surety Bond Guarantee Programs under Part B of Title IV of the Small Business Investment Act of 1958, as amended. Subpart A of this part contains regulations common to both the program requiring prior SBA approval of each bond guarantee (the Prior Approval Program) and the program not requiring prior approval (the PSB Program). Subpart B of this part contains the regulations applicable only to the Prior Approval Program. Subpart C of this part contains the regulations applicable only to the PSB Program.

§ 115.2 Savings clause.

Transactions affected by this part 115 are governed by the regulations in effect at the time they occur.

Subpart A—Provisions for All Surety Bond Guarantees

§ 115.10 Definitions.

AA/SG means SBA's Associate Administrator for Surety Guarantees.

Affiliate is defined in part 121 of this chapter.

Ancillary Bond means a bond incidental and essential to the performance of a Contract for which there is a guaranteed Final Bond.

Bid Bond means a bond conditioned upon the bidder on a Contract entering into the Contract, and furnishing the required Payment and Performance Bonds. The term does not include a forfeiture bond unless it is issued for a jurisdiction where statute or settled decisional law requires forfeiture bonds for public works.

Contract means a written obligation of the Principal requiring the furnishing of services, supplies, labor, materials, machinery, equipment, or construction. A Contract must not prohibit a Surety from performing the Contract upon default of the Principal. A Contract does not include a permit, subdivision contract, lease, land contract, evidence of debt, financial guarantee (e.g., a contract requiring any payment by the Principal to the Obligor), warranty of performance or efficiency, warranty of fidelity, or release

of lien (other than for claims under a guaranteed bond). It includes a maintenance agreement of 2 years or less which covers defective workmanship or materials only. With SBA's written approval, it can also include a longer maintenance agreement covering defective workmanship or materials, or a maintenance agreement covering something other than defective workmanship or materials. To qualify for such approval, the agreement must be ancillary to the Contract for which SBA is guaranteeing a bond, must be required to be performed by the same Principal, and must be customarily required in the relevant trade or industry.

Execution means signing by a representative or agent of the Surety with the authority and power to bind the Surety.

Final Bond means a Performance Bond and/or a Payment Bond.

Imminent Breach means a threat to the successful completion of a bonded Contract which, unless remedied by the Surety, makes a default under the bond appear to be inevitable.

Investment Act means the Small Business Investment Act of 1958 (15 U.S.C. 661 *et seq.*), as amended.

Loss has the meaning set forth in § 115.16.

Obligee means:

(1)(i) In the case of a Bid Bond, the Person requesting bids for the performance of a Contract; or

(ii) In the case of a Final Bond, the Person who has contracted with a Principal for the completion of the Contract and to whom the primary obligation of the Surety runs in the event of a breach by the Principal.

(2) In either case, no Person (other than a Federal department or agency) may be named co-Obligee or Obligee on a bond or on a rider to the bond unless that Person is bound by the Contract to the Principal (or to the Surety, if the Surety has arranged completion of the Contract) to the same extent as the original Obligee. In no event may the addition of one or more co-Obligees increase the aggregate liability of the Surety under the bond.

OSG means SBA's Office of Surety Guarantees.

Payment Bond means a bond which is conditioned upon the payment by the Principal of money to persons who have a right of action against such bond, including those who have furnished labor, materials, equipment and supplies for use in the performance of the Contract. A Payment Bond can not require the Surety to pay an amount which exceeds the claimant's actual loss or damage.

Performance Bond means a bond conditioned upon the completion by the Principal of a Contract in accordance with its terms.

Person means a natural person or a legal entity.

Premium means the amount charged by a Surety to issue bonds. The Premium is determined by applying an approved rate (see §§ 115.32(a) and 115.60(a)(2)) to the bond or contract amount. The Premium does not include surcharges for extra services, whether or not considered part of the "premium" under local law.

Principal means, in the case of a Bid Bond, the Person bidding for the award of a Contract. In the case of Final Bonds and Ancillary Bonds, Principal means the Person primarily liable to complete the Contract, or to make Contract-related payments to other persons, and is the Person whose performance or payment is bonded by the Surety. A Principal may be a prime contractor or a subcontractor.

Prior Approval Agreement means the Surety Bond Guarantee Agreement (SBA Form 990) entered into between a Prior Approval Surety and SBA under which SBA agrees to guarantee a specific bond.

Prior Approval Surety means a Surety which must obtain SBA's prior approval on each guarantee and which has entered into one or more Prior Approval Agreements with SBA.

PSB Agreement means the Preferred Surety Bond Guarantee Agreement entered into between a PSB Surety and SBA.

PSB Surety means a Surety that has been admitted to the Preferred Surety Bond (PSB) Program.

Surety means a company which:

(1)(i) Under the terms of a Bid Bond, agrees to pay a sum of money to the

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Obligee if the Principal breaches the conditions of the bond;

(ii) Under the terms of a Performance Bond, agrees to pay a sum of money or to incur the cost of fulfilling the terms of a Contract if the Principal breaches the conditions of the Contract; and

(iii) Under the terms of a Payment or an Ancillary Bond, agrees to make payment to all who have a right of action against such bond, including those who have furnished labor, materials, equipment and supplies in the performance of the Contract.

(2) The term Surety includes an agent, independent agent, underwriter, or any other company or individual empowered to act on behalf of the Surety.

[61 FR 3271, Jan. 31, 1996; 61 FR 7985, Mar. 1, 1996]

§ 115.11 Applying to participate in the Surety Bond Guarantee Program.

Sureties interested in participating as Prior Approval Sureties or PSB Sureties should apply in writing to the AA/SG at 409 3rd Street, SW., Washington, DC 20416. OSG will determine the eligibility of the applicant considering its standards and procedures for underwriting, administration, claims and recovery. Each applicant must be a corporation listed by the U.S. Treasury as eligible to issue bonds in connection with Federal procurement contracts.

§ 115.12 General program policies and provisions.

(a) *Description of Surety Bond Guarantee Programs.* SBA guarantees Sureties participating in the Surety Bond Guarantee Programs against a portion of their Losses incurred and paid as a result of a Principal's breach of the terms of a Bid Bond, Final Bond or Ancillary Bond, on any eligible Contract. In the Prior Approval Program, the Surety must obtain SBA's approval before a guaranteed bond can be issued. In the PSB Program, selected Sureties may issue, monitor, and service SBA guaranteed bonds without further SBA approval.

(b) *Eligibility of bonds.* Bid Bonds and Final Bonds are eligible for an SBA guarantee if they are executed in connection with an eligible Contract and are of a type listed in the "Contract

Bonds" section of the current Manual of Rules, Procedures and Classifications of the Surety Association of America (100 Wood Avenue South, Iselin, New Jersey 08830). Ancillary Bonds may also be eligible for SBA's guarantee. A Performance Bond must not prohibit a Surety from performing the Contract upon default of the Principal.

(c) *Expiration of Bid Bond Guarantee.* A Bid Bond guarantee expires 120 days after Execution of the Bid Bond, unless the Surety notifies SBA in writing before the 120th day that a later expiration date is required. The notification must include the new expiration date.

(d) *Guarantee agreement.* The terms and conditions of SBA's bond guarantee agreements, including the guarantee percentage, may vary from Surety to Surety, depending on past experience with SBA. If the guarantee percentage is not fixed by the Investment Act, it is determined by OSG after considering, among other things, the rating or ranking assigned to the Surety by recognized authority, and the Surety's Loss rate, average Contract amount, average bond penalty per guaranteed bond, and ratio of Bid Bonds to Final Bonds, all in comparison with other Sureties participating in the same SBA Surety Bond Guarantee Program (Prior Approval or PSB) to a comparable degree. Any guarantee agreement under this part is made exclusively for the benefit of SBA and the Surety, and does not confer any rights (such as a right of action against SBA) or benefits on any other party.

(e) *Amount of Contract—(1) Statutory ceiling.* The amount of the Contract to be bonded must not exceed \$1,250,000 in face value at the time of the bond's Execution.

(2) *Aggregation of Contract amounts.* The amounts of two or more Contracts for a "single project" are aggregated to determine the Contract amount unless the Contracts are to be performed in phases and the prior bond is released before the beginning of each succeeding phase. A bond may be considered released even if the warranty period it is covering has not yet expired. For purposes of this paragraph, a "single project" means one represented by two or more Contracts of one Principal or

its Affiliates with one Obligee or its Affiliates for performance at the same location, regardless of job title or nature of the work to be performed.

(3) *Service and supply contracts.* A service or supply Contract covering more than a 1 year period is eligible for an SBA guaranteed bond if neither the annual Contract amount nor the penal sum of the bond exceeds \$1,250,000 at any time.

(f) *Transfers or sales by Surety.* Sureties must not sell or otherwise transfer their files or accounts, whether before or after a default by the Principal has occurred, without the prior written approval of SBA. A violation of this provision is grounds for termination from participation in the program. This provision does not apply to the sale of an entire business division, subsidiary or operation of the Surety.

§ 115.13 Eligibility of Principal.

(a) *General eligibility.* In order to be eligible for a bond guaranteed by SBA, the Principal must comply with the following requirements:

(1) *Size.* Together with its Affiliates, it must qualify as a small business under part 121 of this title.

(2) *Character.* It must possess good character and reputation. A Principal meets this standard if each owner of 20% or more of its equity, and each of its officers, directors, or general partners, possesses good character and reputation. A Person's good character and reputation is presumed absent when:

(i) The Person is under indictment for, or has been convicted of a felony, or a final civil judgment has been entered stating that such Person has committed a breach of trust or has violated a law or regulation protecting the integrity of business transactions or business relationships; or

(ii) A regulatory authority has revoked, canceled, or suspended a license of the Person which is necessary to perform the Contract; or

(iii) The Person has obtained a bond guarantee by fraud or material misrepresentation (as described in § 115.19(b)), or has failed to keep the Surety informed of unbonded contracts or of a contract bonded by another Surety, as required by a bonding line commitment under § 115.33.

(3) *Need for bond.* It must certify that a bond is expressly required by the bid solicitation or the original Contract in order to bid on the Contract or to serve as a prime contractor or subcontractor.

(4) *Availability of bond.* It must certify that a bond is not obtainable on reasonable terms and conditions without SBA's guarantee.

(5) *Partial subcontract.* It must certify the percentage of work under the Contract to be subcontracted. SBA will not guarantee bonds for Principals who are primarily brokers or who have effectively transferred control over the project to one or more subcontractors.

(6) *Debarment.* It must certify that the Principal is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from transactions with any Federal department or agency, under governmentwide debarment and suspension rules.

(b) *Conflict of interest.* A Principal is not eligible for an SBA-guaranteed bond issued by a particular Surety if that Surety, or an Affiliate of that Surety, or a close relative or member of the household of that Surety or Affiliate owns, directly or indirectly, 10% or more of the Principal. This prohibition also applies to ownership interests in any of the Principal's Affiliates.

§ 115.14 Loss of Principal's eligibility for future assistance.

(a) *Ineligibility.* A Principal and its Affiliates lose eligibility for further SBA bond guarantees if any of the following occurs under an SBA-guaranteed bond issued on behalf of the Principal:

(1) Legal action under the guaranteed bond has been initiated.

(2) The Obligee has declared the Principal to be in default under the Contract.

(3) The Surety has established a claim reserve for the bond of at least \$1000.

(4) The Surety has requested reimbursement for Losses incurred under the bond.

(5) The guarantee fee has not been paid by the Principal.

(6) The Principal committed fraud or material misrepresentation in obtaining the guaranteed bond.

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(b) *Reinstatement of Principal's eligibility.* Prior Approval Sureties should refer to § 115.36(b) for provisions on reinstatement of the Principal's eligibility. A PSB Surety may reinstate a Principal's eligibility upon the Surety's determination that reinstatement is appropriate.

§ 115.15 Underwriting and servicing standards.

(a) *Underwriting.* (1) Sureties must evaluate the credit, capacity, and character of a Principal using standards generally accepted by the surety industry and in accordance with SBA's Standard Operating Procedures on underwriting and the Surety's principles and practices on unguaranteed bonds. The Principal must satisfy the eligibility requirements set forth in § 115.13. The Surety must reasonably expect that the Principal will successfully perform the Contract to be bonded.

(2) The terms and conditions of the bond and the Contract must be reasonable in light of the risks involved and the extent of the Surety's participation. The bond must satisfy the eligibility requirements set forth in § 115.12(b). The Surety must be satisfied as to the reasonableness of cost and the feasibility of successful completion of the Contract.

(b) *Servicing.* The Surety must ensure that the Principal remains viable and eligible for SBA's Surety Bond Guarantee Program, must monitor the Principal's progress on bonded Contracts guaranteed by SBA, and must request job status reports from Obligees of Final Bonds guaranteed by SBA. Documentation of the job status requests must be maintained by the Surety.

§ 115.16 Determination of Surety's Loss.

Loss is determined as follows:

(a) *Loss under a Bid Bond* is the lesser of the penal sum or the amount which is the difference between the bonded bid and the next higher responsive bid. In either case, the Loss is reduced by any amounts the Surety recovers by reason of the Principal's defenses against the Obligee's demand for performance by the Principal and any sums the Surety recovers from indemnitors and other salvage.

(b) *Loss under a Payment Bond* is, at the Surety's option, the sum necessary to pay all just and timely claims against the Principal for the value of labor, materials, equipment and supplies furnished for use in the performance of the bonded Contract and other covered debts, or the penal sum of the Payment Bond. In either case, the Loss includes interest (if any), but Loss is reduced by any amounts recovered (through offset or otherwise) by reason of the Principal's claims against laborers, materialmen, subcontractors, suppliers, or other rightful claimants, and by any amounts recovered from indemnitors and other salvage.

(c) *Loss under a Performance Bond* is, at the Surety's option, the sum necessary to meet the cost of fulfilling the terms of a bonded Contract or the penal sum of the bond. In either case, the Loss includes interest (if any), but Loss is reduced by any amounts recovered (through offset or otherwise) by reason of the Principal's defenses or causes of action against the Obligee, and by any amounts recovered from indemnitors and other salvage.

(d) *Loss under an Ancillary Bond* is the amount covered by such bond which is attributable to the Contract for which guaranteed Final Bonds were Executed.

(e) *Loss includes* the following expenses if they are itemized, documented and attributable solely to the Loss under the guaranteed bond:

(1) Amounts actually paid by the Surety which are specifically allocable to the investigation, adjustment, negotiation, compromise, settlement of, or resistance to a claim for Loss resulting from the breach of the terms of the bonded Contract. Any cost allocation method must be reasonable and must comply with generally accepted accounting principles; and

(2) Amounts actually paid by the Surety for court costs and reasonable attorney's fees incurred to mitigate any Loss under paragraphs (a) through (e)(1) of this section including suits to obtain sums due from Obligees, indemnitors, Principals and others.

(f) *Loss does not include* the following expenses:

(1) Any unallocated expenses, or any clear mark-up on expenses or any overhead, of the Surety, its attorney, or

any other party hired by the Surety or the attorney;

(2) Expenses paid for any suits, cross-claims, or counterclaims filed against the United States of America or any of its agencies, officers, or employees unless the Surety has received, prior to filing such suit or claim, written concurrence from SBA that the suit may be filed;

(3) Attorney's fees and court costs incurred by the Surety in a suit by or against SBA or its Administrator; and

(4) Fees, costs, or other payments, including tort damages, arising from a successful tort suit or claim by a Principal or any other Person against the Surety.

§ 115.17 Minimization of Surety's Loss.

(a) *Indemnity agreements and collateral*—(1) *Requirements.* The Surety must take all reasonable action to minimize risk of Loss including, but not limited to, obtaining from each Principal a written indemnity agreement which covers actual Losses under the Contract and Imminent Breach payments under § 115.34(a) or § 115.69. The indemnity agreement must be secured by such collateral as the Surety or SBA finds appropriate. Indemnity agreements from other Persons, secured or unsecured, may also be required by the Surety or SBA.

(2) *Prohibitions.* No indemnity agreement may be obtained from the Surety, its agent or any other representative of the Surety. The Surety must not separately collateralize the portion of its bond which is not guaranteed by SBA.

(b) *Salvage and recovery*—(1) *General.* The Surety must pursue all possible sources of salvage and recovery. Salvage and recovery includes all payments made in settlement of the Surety's claim, even though the Surety has incurred other losses as a result of that Principal which are not reimbursable by SBA.

(2) *SBA's share.* SBA is entitled to its guaranteed percentage of all salvage and recovery from a defaulted Principal, its guarantors and indemnitors, and any other party, received by the Surety in connection with the guaranteed bond or any other bond issued by the Surety on behalf of the Principal unless such recovery is unquestionably

identifiable as related solely to the non-guaranteed bond. The Surety must reimburse or credit SBA (in the same proportion as SBA's share of Loss) within 90 days of receipt of any recovery by the Surety.

(3) *Multiple Sureties.* In any dispute between two or more Sureties concerning recovery under SBA guaranteed bonds, the dispute must first be brought to the attention of OSG for an attempt at mediation and settlement.

§ 115.18 Refusal to issue further guarantees; suspension and termination of PSB status.

(a) *Improper surety bond guarantee practices*—(1) *Imprudent practices.* SBA may refuse to issue further guarantees to a Prior Approval Surety or may suspend the preferred status of a PSB Surety, by written notice stating all reasons for such decision and the effective date. Reasons for such a decision include, but are not limited to, a determination that the Surety (in its underwriting, its efforts to minimize Loss, its claims or recovery practices, or its documentation related to SBA guaranteed bonds) has failed to adhere to prudent standards or practices, including any standards or practices required by SBA, as compared to those of other Sureties participating in the same SBA Surety Bond Guarantee Program to a comparable degree.

(2) *Regulatory violations, fraud.* Acts of wrongdoing such as fraud, material misrepresentation, breach of the Prior Approval or PSB Agreement, or regulatory violations (as defined in §§ 115.19(d) and 115.19(h)) also constitute sufficient grounds for refusal to issue further guarantees, or in the case of a PSB Surety, termination of preferred status.

(3) *Audit; records.* The failure of a Surety to consent to SBA's audit or to maintain and produce records constitutes grounds for SBA to refuse to issue further guarantees for a Prior Approval Surety, to suspend a PSB Surety from participation, and to refuse to honor claims submitted by a Prior Approval or PSB Surety until the Surety consents to the audit.

(4) *Excessive Losses.* If a Surety experiences excessive Losses on SBA guaranteed bonds relative to those of other

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Sureties participating in the same SBA Surety Bond Guarantee Program to a comparable degree, SBA may also require the renegotiation of the guarantee percentage and/or SBA's charge to the Surety for bonds executed thereafter.

(b) *Lack of business integrity.* A Surety's participation in the Surety Bond Guarantee Programs may be denied, suspended, or terminated upon the occurrence of any event in paragraphs (b) (1) through (5) of this section involving any of the following Persons: The Surety or any of its officers, directors, partners, or other individuals holding at least 20% of the Surety's voting securities, and any agents, underwriters, or any individual empowered to act on behalf of any of the preceding Persons.

(1) If a State or other authority has revoked, canceled, or suspended the license required of such Person to engage in the surety business, the right of such Person to participate in the SBA Surety Bond Guarantee Program may be denied, terminated, or suspended, as applicable, in that jurisdiction or in other jurisdictions. Ineligibility or suspension from the Surety Bond Guarantee Programs is for at least the duration of the license suspension.

(2) If such Person has been indicted or otherwise formally charged with a misdemeanor or felony bearing on such Person's fitness to participate in the Surety Bond Guarantee Programs, the participation of such Person may be suspended pending disposition of the charge. Upon conviction, participation may be denied or terminated.

(3) If a final civil judgment is entered holding that such Person has committed a breach of trust or violation of a law or regulation protecting the integrity of business transactions or relationships, participation may be denied or terminated.

(4) If such Person has made a material misrepresentation or willfully false statement in the presentation of oral or written information to SBA in connection with an application for a surety bond guarantee or the presentation of a claim, or committed a material breach of the Prior Approval or PSB Agreement or a material violation of the regulations (all as described in

§ 115.19), participation may be denied or terminated.

(5) If such Person is debarred, suspended, voluntarily excluded from, or declared ineligible for participation in Federal programs, participation may be denied or terminated.

(c) *Notification requirement.* The Prior Approval or PSB Surety must promptly notify SBA of the occurrence of any event in paragraphs (b) (1) through (5) of this section, or if any of the Persons described in paragraph (b) of this section does not, or ceases to, qualify as a Surety. SBA may require submission of a Statement of Personal History (SBA Form 912) from any of these Persons.

(d) *SBA proceedings.* Decisions to suspend, terminate, deny participation in, or deny reinstatement in the Surety Bond Guarantee program are made by the AA/SG. A Surety may file a petition for review of suspensions and terminations with the SBA Office of Hearings and Appeals (OHA) under part 134 of this chapter. SBA's Administrator may, pending a decision pursuant to part 134 of this chapter, suspend the participation of any Surety for any of the causes listed in paragraphs (b) (1) through (5) of this section.

(e) *Effect on guarantee.* A guarantee issued by SBA before a suspension or termination under this section remains in effect, subject to SBA's right to deny liability under the guarantee.

§ 115.19 Denial of liability.

In addition to equitable and legal defenses and remedies under contract law, the Act and the regulations in this part, SBA is not liable under a Prior Approval or PSB Agreement if any of the circumstances in paragraphs (a) through (h) of this section exist.

(a) *Excess Contract or bond amount.* The total Contract amount at the time of Execution of the bond exceeds \$1,250,000 in face value (see § 115.12(e)), or the bond amount at any time exceeds the total Contract amount.

(b) *Misrepresentation or fraud.* The Surety obtained the Prior Approval or PSB Agreement, or applied for reimbursement for losses, by fraud or material misrepresentation. Material misrepresentation includes (but is not limited to) both the making of an untrue statement of material fact and the

omission of a statement of material fact necessary to make a statement not misleading in light of the circumstances in which it was made. Material misrepresentation also includes the adoption by the Surety of a material misstatement made by others which the Surety knew or under generally accepted underwriting standards should have known to be false or misleading. The Surety's failure to disclose its ownership (or the ownership by any owner of at least 20% of the Surety's equity) of an interest in a Principal or an Obligor is considered the omission of a statement of material fact.

(c) *Material breach.* The Surety has committed a material breach of one or more terms or conditions of its Prior Approval or PSB Agreement. A material breach is considered to have occurred if:

(1) Such breach (or such breaches in the aggregate) causes an increase in the Contract amount or in the bond amount of at least 25% or \$50,000; or

(2) One of the conditions under Part B of Title IV of the Investment Act is not met.

(d) *Substantial regulatory violation.* The Surety has committed a "substantial violation" of SBA regulations. For purposes of this paragraph, a "substantial violation" is a violation which causes an increase in the bond amount of at least 25% or \$50,000 in the aggregate, or is contrary to the purposes of the Surety Bond Guarantee Programs.

(e) *Alteration.* Without obtaining prior written approval from SBA (which may be conditioned upon payment of additional fees), the Surety agrees to or acquiesces in any material alteration in the terms, conditions, or provisions of the bond, including but not limited to the following acts:

(1) Naming as an Obligor or co-Obligor any Person that does not qualify as an Obligor under § 115.10; or

(2) In the case of a Prior Approval Surety, acquiescing in any alteration to the bond which would increase the bond amount by at least 25% or \$50,000.

(f) *Timeliness.* (1) Either:

(i) The bond was Executed prior to the date of SBA's guarantee; or

(ii) The bond was Executed (or approved, if the Surety is legally bound

by such approval) after the work under the Contract had begun, unless SBA executes a "Surety Bond Guarantee Agreement Addendum" (SBA Form 991) after receiving all of the following from the Surety:

(A) Satisfactory evidence, including a certified copy of the Contract (or a sworn affidavit from the Principal), showing that the bond requirement was contained in the original Contract, or other documentation satisfactory to SBA, showing why a bond was not previously obtained and is now being required;

(B) Certification by the Principal that all taxes and labor costs are current, and listing all suppliers and subcontractors, indicating that they are all paid to date, and attaching a waiver of lien from each; or an explanation satisfactory to SBA why such documentation cannot be produced; and

(C) Certification by the Obligor that all payments due under the Contract to date have been made and that the job has been satisfactorily completed to date.

(2)(i) For purposes of paragraph (f)(1)(ii) of this section, work under a Contract is considered to have begun when a Principal takes any action at the job site which would have exposed its Surety to liability under applicable law had a bond been Executed (or approved, if the Surety is legally bound by such approval) at the time.

(ii) For purposes of this paragraph (f), the Surety must maintain a contemporaneous record of the Execution and approval of each bond.

(g) *Principal fee.* The Surety has not remitted to SBA the Principal's payment for the full amount of the guarantee fee within the time period required under § 115.30(d) for Prior Approval Sureties or § 115.66 for PSB Sureties. SBA may reinstate the guarantee upon a showing that the Contract is not in default and that a valid reason exists why a timely submission was not made.

(h) *Other regulatory violations.* The occurrence of any of the following:

(1) The Principal on the bonded Contract is not a small business;

(2) The bond was not required under the bid solicitation or the original Contract;

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(3) The bond was not eligible for guarantee by SBA because the bonded contract was not a Contract as defined in § 115.10;

(4) The loss occurred under a bond that was not guaranteed by SBA;

(5) The loss incurred by the Surety was not a Loss as determined under § 115.16; or

(6) The Surety's loss under a Performance Bond did not result from the Principal's breach or Imminent Breach of the Contract.

§ 115.20 Insolvency of Surety.

(a) *Successor in interest.* If a Surety becomes insolvent, all rights or benefits conferred on the Surety under a valid and binding Prior Approval or PSB Agreement will accrue only to the trustee or receiver of the Surety. SBA will not be liable to the trustee or receiver of the insolvent Surety except for the guaranteed portion of any Loss incurred and actually paid by such Surety or its trustee or receiver under the guaranteed bonds.

(b) *Filing requirement.* The trustee or receiver must submit to SBA quarterly status reports accounting for all funds received and all settlements being considered.

§ 115.21 Audits and investigations.

(a) *Audits—(1) Scope of audit.* SBA may audit in the office of a Prior Approval or PSB Surety, the Surety's attorneys or consultants, or the Principal or its subcontractors, all documents, files, books, records, tapes, disks and other material relevant to SBA's guarantee, commitments to guarantee a surety bond, or agreements to indemnify the Prior Approval or PSB Surety. See § 115.18(a)(3) for consequences of failure to comply with this section.

(2) *Frequency of PSB audits.* Each PSB Surety is subject to audit at least once each year by examiners selected and approved by SBA.

(b) *Records.* The Surety must maintain the records listed in this paragraph (b) for the term of each bond, plus any additional time required to settle any claims of the Surety for reimbursement from SBA and to attempt salvage or other recovery, plus an additional 3 years. If there are any unre-

solved audit findings in relation to a particular bond, the Surety must maintain the related records until the findings are resolved. The records to be maintained include the following:

(1) A copy of the bond;

(2) A copy of the bonded Contract;

(3) All documentation submitted by the Principal in applying for the bond;

(4) All information gathered by the Surety in reviewing the Principal's application;

(5) All documentation of any of the events set forth in § 115.35(a) or § 115.65(c)(2);

(6) All records of any transaction for which the Surety makes payment under or in connection with the bond, including but not limited to claims, bills (including lawyers' and consultants' bills), judgments, settlement agreements and court or arbitration decisions, consultants' reports, Contracts and receipts;

(7) All documentation relating to efforts to mitigate Losses, including documentation required by § 115.34(a) or § 115.69 concerning Imminent Breach;

(8) All records of any accounts into which fees and funds obtained in mitigation of Losses were paid and from which payments were made under the bond, and any other trust accounts, and any reconciliations of such accounts;

(9) Job status reports received from Obligees and documentation of each unanswered request for a job status report; and

(10) All documentation relating to any collateral held by or available to the Surety.

(c) *Purpose of audit.* SBA's audit will determine, but not be limited to:

(1) The adequacy and sufficiency of the Surety's underwriting and credit analysis, its documentation of claims and claims settlement procedures and activities, and its recovery procedures and practices;

(2) The Surety's minimization of Loss, including the exercise of bond options upon Contract default; and

(3) The Surety's loss ratio in comparison with other Sureties participating in the same SBA Surety Bond Guarantee Program to a comparable degree.

(d) *Investigations.* SBA may conduct investigations to inquire into the possible violation by any Person of the Small Business Act or the Investment Act, or of any rule or regulation under those Acts, or of any order issued under those Acts, or of any Federal law relating to programs and operations of SBA.

Subpart B—Guarantees Subject to Prior Approval

§ 115.30 Submission of Surety's guarantee application.

(a) *Legal effect of application.* By submitting an application to SBA for a bond guarantee, the Prior Approval Surety certifies that the Principal meets the eligibility requirements set forth in § 115.13 and that the underwriting standards set forth in § 115.15 have been met.

(b) *SBA's determination.* SBA's approval or decline of a guarantee application is made in writing by an authorized SBA officer. The officer may provide telephone notice before the Prior Approval Surety receives SBA's guarantee approval form if the officer has already signed the form. In the event of a conflict between the telephone notice and the written form, the written form controls.

(c) *Reconsideration/appeal of SBA determination.* A Prior Approval Surety may request reconsideration of a decline from the SBA officer who made the decision. If the decision on reconsideration is negative, the Surety may appeal to an individual designated by the AA/SG. If the decision is again adverse, the Surety may appeal to the AA/SG, who will make the final decision.

(d) *Notice and payment to SBA.* When the Surety has Executed a Final Bond, including a Final Bond under a bonding line, the Surety must complete the Prior Approval Agreement, and submit the form, together with the Principal's payment for its guarantee fee (see § 115.32(b)) to SBA within 45 days, or in the case of a bonding line, within 15 business days (see § 115.33(d)(2)) after Execution of the bond.

§ 115.31 Guarantee percentage.

(a) *Ninety percent.* SBA reimburses a Prior Approval Surety for 90% of the Loss incurred and paid if:

(1) The total amount of the Contract at the time of Execution of the bond is \$100,000 or less; or

(2) The bond was issued on behalf of a small business owned and controlled by socially and economically disadvantaged individuals or on behalf of a qualified HUBZone small business concern.

(b) *Eighty percent.* SBA reimburses a Prior Approval Surety in an amount not to exceed 80% of the Loss incurred and paid on bonds for Contracts in excess of \$100,000 which are executed on behalf of non-disadvantaged concerns.

(c) *Contract increase to over \$100,000.* If the Contract amount increases to more than \$100,000 after Execution of the bond, the guarantee percentage decreases by one percentage point for each \$5,000 of increase or part thereof, but it does not decrease below 80%. This provision applies only to guarantees which qualify under paragraph (a)(1) of this section.

(d) *Contract increase to over \$1,250,000.* If the Contract amount increases above the statutory limit of \$1,250,000 after Execution of the bond, SBA's share of the Loss is limited to that percentage of the increased Contract amount which the statutory limit represents, multiplied by the guarantee percentage approved by SBA. For example, if a Contract amount increases to \$1,375,000, SBA's share of the Loss under an 80% guarantee is limited to 72.73% $\left[\frac{1,250,000}{1,375,000} = 90.91\% \times 80\% = 72.73\% \right]$.

(e) *Contract decrease to \$100,000 or less.* If the Contract amount decreases to \$100,000 or less after Execution of the bond, SBA's guarantee percentage increases to 90% if the Surety provides SBA with evidence supporting the decrease and any other information or documents requested.

[61 FR 3271, Jan. 31, 1996, as amended at 64 FR 18324, Apr. 14, 1999]

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§ 115.32 Fees and Premiums.

(a) *Surety's Premium.* A Prior Approval Surety must not charge a Principal an amount greater than that authorized by the appropriate insurance department. The Surety must not require the Principal to purchase casualty or other insurance or any other services from the Surety or any Affiliate or agent of the Surety. The Surety must not charge non-Premium fees to a Principal unless the Surety performs other services for the Principal, the additional fee is permitted by State law, and the Principal agrees to the fee.

(b) *SBA charge to Principal.* SBA does not charge Principals application or Bid Bond guarantee fees. If SBA guarantees a Final Bond, the Principal must pay a guarantee fee equal to a certain percentage of the Contract amount. The percentage is determined by SBA and is published in Notices in the FEDERAL REGISTER from time to time. The Principal's fee is rounded to the nearest dollar and is to be remitted to SBA by the Surety together with the form required under § 115.30(d). See paragraph (d) of this section for additional requirements when the Contract amount changes.

(c) *SBA charge to Surety.* SBA does not charge Sureties application or Bid Bond guarantee fees. Subject to § 115.18(a)(4), the Surety must pay SBA a guarantee fee on each guaranteed bond (other than a Bid Bond) in the ordinary course of business. The fee is a certain percentage of the bond Premium, determined by SBA and published in Notices in the FEDERAL REGISTER from time to time. The fee is rounded to the nearest dollar. SBA does not receive any portion of a Surety's non-Premium charges. See paragraph (d) of this section for additional requirements when the bond amount or the Contract amount changes.

(d) *Contract or bond increases/decreases—(1) Notification and approval.* The Prior Approval Surety must notify SBA of any increases or decreases in the Contract or bond amount that aggregate 25% or \$50,000, as soon as the Surety acquires knowledge of the change. Whenever the original bond amount increases as a result of a single change order of at least 25% or \$50,000, the prior written approval of such in-

crease by SBA is required on a supplemental Prior Approval Agreement (Supplemental Form 990) and is conditioned upon payment by the Surety of the increase in the Principal's guarantee fee as set forth in paragraph (d)(2) of this section.

(2) *Increases; fees.* Notification of increases in the Contract or bond amount under this paragraph (d) must be accompanied by payment of the increase in the Principal's guarantee fee computed on the increase in the Contract amount. If the increase in the Principal's fee is less than \$40, such increase is not due until all unpaid increases in the Principal's fee aggregate at least \$40. The Surety's check for payment of the increase in the Surety's guarantee fee, computed on the increase in the bond Premium, may be submitted in the ordinary course of business. Increases in the Surety's fee are not due until they aggregate at least \$40.

(3) *Decreases; refunds.* Whenever SBA is notified of a decrease in the Contract or bond amount, SBA will refund to the Principal a proportionate amount of the Principal's guarantee fee and rebate to the Surety a proportionate amount of SBA's Premium share in the ordinary course of business. If the amount to be refunded or rebated is less than \$40, such refund or rebate will not be made until the amounts to be refunded or rebated, respectively, aggregate at least \$40. Upon receipt of the refund, the Surety must promptly pay a proportionate amount of its Premium to the Principal.

§ 115.33 Surety bonding line.

A surety bonding line is a written commitment by SBA to a Prior Approval Surety which provides for the Surety's Execution of multiple bonds for a specified small business strictly within pre-approved terms, conditions and limitations. In applying for a bonding line, the Surety must provide SBA with information on the applicant as requested. In addition to the other limitations and provisions set forth in this part 115, the following conditions apply to each surety bonding line:

(a) *Underwriting.* A bonding line may be issued by SBA for a Principal only if

the underwriting evaluation is satisfactory. The Prior Approval Surety must require the Principal to keep it informed of all its contracts, whether bonded by the same or another surety or unbonded, during the term of the bonding line.

(b) *Bonding line conditions.* The bonding line contains limitations on the following:

(1) The term of the bonding line, not to exceed 1 year subject to renewal in writing;

(2) The total dollar amount of the Principal's bonded and unbonded work on hand at any time, including outstanding bids, during the term of the bonding line;

(3) The number of such bonded and unbonded contracts outstanding at any time during the term of the bonding line;

(4) The maximum dollar amount of any single guaranteed bonded Contract;

(5) The timing of Execution of bonds under the bonding line—bonds must be dated and Executed before the work on the underlying Contract has begun, or the Surety must submit to SBA the documentation required under § 115.19(f)(1)(ii); and

(6) Any other limitation related to type, specialty of work, geographical area, or credit.

(c) *Excess bonding.* If, after a bonding line is issued, the Principal desires a bond and the Surety desires a guarantee exceeding a limitation of the bonding line, the Surety must submit an application to SBA under regular procedures.

(d) *Submission of forms to SBA—(1) Bid Bonds.* Within 15 business days after the Execution of any Bid Bonds under a bonding line, the Surety must submit a "Surety Bond Guarantee Underwriting Review" (SBA Form 994B) to SBA for approval. If that form is already on file with SBA and no new financial statements are required or have been received from the Principal, a "Surety Bond Guarantee Review Update" (SBA Form 994C) may be submitted instead. If the Surety fails to submit either form within this time period, SBA's guarantee of the bond will be void from its inception unless SBA determines otherwise upon a showing

that a valid reason exists why the timely submission was not made.

(2) *Final Bonds.* Within 15 business days after the Execution of any Final Bonds under a bonding line, the Surety must submit a signed Prior Approval Agreement and a "Surety Bond Guarantee Underwriting Review" (SBA Form 994B) to SBA for approval. If that form is already on file with SBA and no new financial statements are required or have been received from the Principal, a "Surety Bond Guarantee Review Update" (SBA Form 994C) may be submitted instead. If the Surety fails to submit these forms together with the Principal's payment for its guarantee fee within this time period, SBA's guarantee of the bond will be void from its inception unless SBA determines otherwise upon a showing that the Contract is not in default and a valid reason exists why the timely submission was not made.

(3) *Additional information.* The Surety must submit any other data SBA requests.

(e) *Cancellation of bonding line—(1) Optional cancellation.* Either SBA or the Surety may cancel a bonding line at any time, with or without cause, upon written notice to the other party. Upon the receipt of any adverse information concerning the Principal, the Surety must promptly notify SBA, and SBA may cancel the bonding line.

(2) *Mandatory cancellation.* Upon the occurrence of a default by the Principal, whether under a contract bonded by the same or another surety or an unbonded contract, the Surety must immediately cancel the bonding line.

(3) *Effect of cancellation.* Cancellation of a bonding line by SBA is effective upon receipt of written notice by the Surety. Bonds issued before the effective date of cancellation remain guaranteed by SBA. Upon cancellation by SBA or the Surety, the Surety must promptly notify the Principal in writing.

§ 115.34 Minimization of Surety's Loss.

(a) *Imminent Breach—(1) Prior approval requirement.* SBA will reimburse its guaranteed share of payments made by a Surety to avoid or attempt to avoid an Imminent Breach of the terms

of a Contract covered by an SBA guaranteed bond only if the payments were made with the prior approval of OSG. OSG's prior approval will be given only if the Surety demonstrates to SBA's satisfaction that a breach is imminent and that there is no other recourse to prevent such breach.

(2) *Amount of reimbursement.* The aggregate of the payments by SBA to avoid Imminent Breach cannot exceed 10% of the Contract amount, unless the Administrator finds that a greater payment (not to exceed the guaranteed share of the bond penalty) is necessary and reasonable. In no event will SBA make any duplicate payment pursuant to this or any other provision of this part 115.

(3) *Recordkeeping requirement.* The Surety must keep records of payments made to avoid Imminent Breach.

(b) *Salvage and recovery.* A Prior Approval Surety must pursue all possible sources of salvage and recovery until SBA concurs with the Surety's recommendation for a discontinuance or for a settlement. The Surety must certify that continued pursuit of salvage and recovery would be neither economically feasible nor a viable strategy in maximizing recovery. See also § 115.17(b).

§ 115.35 Claims for reimbursement of Losses.

(a) *Notification requirements—(1) Events requiring notification.* A Prior Approval Surety must notify OSG of the occurrence of any of the following:

(i) Legal action under the bond has been initiated.

(ii) The Obligor has declared the Principal to be in default under the Contract.

(iii) The Surety has established a claim reserve for the bond.

(iv) The Surety has received any adverse information concerning the Principal's financial condition or possible inability to complete the project or to pay laborers or suppliers.

(2) *Timing of notification.* Notification must be made in writing at the earlier of the time the Surety applies for a guarantee on behalf of an affected Principal, or within 30 days of the date the Surety acquires knowledge, or

should have acquired knowledge, of any of the listed events.

(b) *Surety action.* The Surety must take all necessary steps to mitigate Losses resulting from any of the events in paragraph (a) of this section, including the disposal at fair market value of any collateral held by or available to the Surety. Unless SBA notifies the Surety otherwise, the Surety must take charge of all claims or suits arising from a defaulted bond, and compromise, settle and defend such suits. The Surety must handle and process all claims under the bond and all settlements and recoveries as it does on non-guaranteed bonds.

(c) *Claim reimbursement requests.* (1) Claims for reimbursement for Losses which the Surety has paid must be submitted (together with a copy of the bond, the bonded Contract, and any indemnity agreements) with the initial claim to OSG on a "Default Report, Claim for Reimbursement and Record of Administrative Action" (SBA Form 994H), within 1 year from the time of each disbursement. Claims submitted after 1 year must be accompanied by substantiation satisfactory to SBA. The date of the claim for reimbursement is the date of receipt of the claim by SBA, or such later date as additional information requested by SBA is received.

(2) The Surety must also submit evidence of the disposal of all collateral at fair market value.

(3) SBA may request additional information prior to reimbursing the Surety for its Loss.

(4) Subject to the offset provisions of part 140, SBA pays its share of the Loss incurred and paid by the Surety within 90 days of receipt of the requisite information.

(5) Claims for reimbursement and any additional information submitted are subject to review and audit by SBA, including but not limited to the Surety's compliance with SBA's regulations and forms.

(d) *Status updates.* The Surety must submit semiannual status reports on each claim 6 months after the initial default notice, and then every 6 months. The Surety must notify SBA immediately of any substantial

changes in the status of the claim or the amounts of Loss reserves.

(e) *Reservation of SBA rights.* The payment by SBA of a Surety's claim does not waive or invalidate any of the terms of the Prior Approval Agreement, the regulations set forth in this part 115, or any defense SBA may have against the Surety. Within 30 days of receipt of notification that a claim or any portion of a claim should not have been paid by SBA, the Surety must repay the specified amounts to SBA.

§ 115.36 Indemnity settlements and reinstatement of Principal.

(a) *Indemnity settlements.* (1) An indemnity settlement occurs when a defaulted Principal and its Surety agree upon an amount, less than the actual loss under the bond, which will satisfy the Principal's indebtedness to the Surety. Sureties must not agree to any indemnity settlement proposal or enter into any such agreement without SBA's concurrence.

(2) Any settlement proposal submitted for SBA's consideration must include current financial information, including financial statements, tax returns, and credit reports, together with the Surety's written recommendations. It should also indicate whether the Principal is interested in further bonding.

(3) The Surety must pay SBA its *pro rata* share of the settlement amount within 90 days of receipt. Prior to closing the file on a Principal, the Surety must certify that SBA has received its *pro rata* share of all indemnity recovery.

(b) *Conditions for reinstatement.* At any time after a Principal becomes ineligible for further bond guarantees under § 115.14(a), the Surety may recommend that such Principal's eligibility be reinstated. OSG may agree to reinstate the Principal and its Affiliates if:

(1) The Principal's guarantee fee has been paid to SBA and SBA receives evidence that the Principal has paid all delinquent amounts due to the Surety (including amounts for Imminent Breach); or

(2) The Surety has settled its claim with the Principal for an amount and on terms accepted by OSG; or

(3) The Principal contests a claim and provides collateral, acceptable to the Surety and OSG, which has a liquidation value of at least the amount of the claim including related expenses; or

(4) The Principal's indebtedness to the Surety is discharged by operation of law (e.g., bankruptcy discharge); or

(5) OSG and the Surety determine that further bond guarantees are appropriate.

(c) *Underwriting after reinstatement.* A guarantee application submitted after reinstatement of the Principal's eligibility is subject to a very stringent underwriting review.

Subpart C—Preferred Surety Bond (PSB) Guarantees

§ 115.60 Selection and admission of PSB Sureties.

(a) *Selection of PSB Sureties.* SBA's selection of PSB Sureties will be guided by, but not limited to, these factors:

(1) An underwriting limitation of at least \$1,250,000 on the U.S. Treasury Department list of acceptable sureties;

(2) An agreement to charge Principals no more than the Surety Association of America's advisory premium rates in effect on August 1, 1987;

(3) Premium income from contract bonds guaranteed by any government agency (Federal, State or local) of no more than one-quarter of the total contract bond premium income of the Surety;

(4) The vesting of underwriting authority for SBA guaranteed bonds only in employees of the Surety;

(5) The vesting of final settlement authority for claims and recovery under the PSB program only in employees of the Surety's permanent claims department; and

(6) The rating or ranking designations assigned to the Surety by recognized authority.

(b) *Admission of PSB Sureties.* A Surety admitted to the PSB program must execute a PSB Agreement before approving SBA guaranteed bonds. No SBA guarantee attaches to bonds approved before the AA/SG or designee has countersigned the Agreement.

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§ 115.61 Duration of PSB program.

The PSB program terminates on September 30, 2000, unless extended by legislation. SBA guarantees effective under this program on or before September 30, 2000, will remain in effect after such date.

[61 FR 3271, Jan. 31, 1996, as amended at 63 FR 12605, Mar. 16, 1998]

§ 115.62 Prohibition on participation in Prior Approval program.

Neither a PSB Surety nor any of its Affiliates is eligible to submit applications under subpart B of this part.

§ 115.63 Allotment of guarantee authority.

(a) *General.* SBA allots to each PSB Surety a periodic maximum guarantee authority. No SBA guarantee attaches to bonds approved by a PSB Surety if the bonds exceed the allotted authority for the period in which the bonds are approved. No reliance on future authority is permitted. An allotment can be increased only by prior written permission of SBA.

(b) *Execution of Bid Bonds.* When the PSB Surety Executes a Bid Bond, SBA debits the Surety's allotment for an amount equal to the guarantee percentage of the estimated penal sum of the Final Bond SBA would guarantee if the Contract were awarded. If the Contract is then awarded for an amount other than the bid amount, or if the bid is withdrawn or the Bid Bond guarantee has expired (see § 115.12(c)), SBA debits or credits the Surety's allotment accordingly.

(c) *Execution of Final Bonds.* If the PSB Surety Executes a guaranteed Final Bond, but not the related Bid Bond, SBA debits the Surety's allotment for an amount equal to the guarantee percentage of the penal sum of the Final Bond. SBA will debit the allotment for increases, and credit the allotment for decreases, in the bond amount.

(d) *Release and non-issuance of Final Bonds.* The release of Final Bonds upon completion of the Contract does not restore the corresponding allotment. If, however, a PSB Surety approves a Final Bond but never issues the bond, SBA will credit the Surety's allotment

for an amount equal to the guarantee percentage of the penal sum of the bond. In that event, the Surety must notify SBA as soon as possible, but in no event later than 5 business days after the non-issuance has been determined. Until the Surety has so notified SBA, it cannot rely on such credit.

§ 115.64 Timeliness requirement.

There must be no Execution or approval of a bond by a PSB Surety after commencement of work under a Contract unless the Surety obtains written approval from the AA/SG. To apply for such approval, the Surety must submit a completed "Surety Bond Guarantee Agreement Addendum" (SBA Form 991), together with the evidence and certifications described in § 115.19(f)(1)(ii).

§ 115.65 General PSB procedures.

(a) *Retention of information.* A PSB Surety must comply with all applicable SBA regulations and obtain from its applicants all the information and certifications required by SBA. The PSB Surety must document compliance with SBA regulations and retain such certifications in its files, including a contemporaneous record of the date of approval and Execution of each bond. See also § 115.19(f). The certifications and other information must be made available for inspection by SBA or its agents and must be available for submission to SBA in connection with the Surety's claims for reimbursement. The PSB Surety must retain the certifications and other information for the term of the bond, plus such additional time as may be required to settle any claims of the Surety for reimbursement from SBA and to attempt salvage or other recovery, plus an additional 3 years. If there are any unresolved audit findings in relation to a particular bond, the Surety must maintain the related certifications and other information until the findings are resolved.

(b) *Usual staff and procedures.* The approval, Execution and administration by a PSB Surety of SBA guaranteed bonds must be handled in the same manner and with the same staff as the

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Surety's activity outside the PSB program. The Surety must request job status reports from Obligees in accordance with its own procedures.

(c) *Notification to SBA.* (1) *Approvals.* A PSB Surety must notify SBA by electronic transmission or monthly bordereau, as agreed between the Surety and SBA, of all approved Bid and Final Bonds, and of the Surety's approval of increases and decreases in the Contract or bond amount. The notice must contain the information specified from time to time in agreements between the Surety and SBA. SBA may deny liability with respect to Final Bonds for which SBA has not received timely notice.

(2) *Other events requiring notification.* The PSB Surety must notify SBA within 30 calendar days of the name and address of any Principal against whom legal action on the bond has been instituted; whenever an Obligee has declared a default; whenever the Surety has established or added to a claim reserve; of the recovery of any amounts on the guaranteed bond; and of any decision by the Surety to bond any such Principal again.

§ 115.66 Fees.

The PSB Surety must pay SBA a certain percentage of the Premium it charges on Final Bonds. The PSB Surety must also remit to SBA the Principal's payment for its guarantee fee, equal to a certain percentage of the Contract amount. The fee percentages are determined by SBA and are published in Notices in the FEDERAL REGISTER from time to time. Each fee is rounded to the nearest dollar. The Surety must remit SBA's Premium share and the Principal's guarantee fee with the bordereau listing the related Final Bond, as required in the PSB Agreement.

§ 115.67 Changes in Contract or bond amount.

(a) *Increases.* The PSB Surety must process Contract or bond amount increases within its allotment in the same manner as initial guaranteed bond issuances (see § 115.65(c)(1)). The Surety must present checks for additional fees due from the Principal and

the Surety on increases aggregating 25% of the contract or bond amount or \$50,000, and attach such payments to the respective monthly bordereau. If the additional Principal's fee or Surety's fee is less than \$40, such fee is not due until all unpaid increases in such fee aggregate at least \$40.

(b) *Decreases.* If the Contract or bond amount is decreased, SBA will refund to the Principal a proportionate amount of the guarantee fee, and adjust SBA's Premium share accordingly in the ordinary course of business. No refund or adjustment will be made until the amounts to be refunded or rebated, respectively, aggregate at least \$40.

§ 115.68 Guarantee percentage.

SBA reimburses a PSB Surety in an amount not to exceed 70% of the Loss incurred and paid. Where the Contract amount, after the Execution of the bond, increases beyond the statutory limit of \$1,250,000, SBA's share of the Loss is limited to that percentage of the increased Contract amount which the statutory limit represents, multiplied by the guarantee percentage approved by SBA. For an example, see § 115.31(d).

§ 115.69 Imminent Breach.

(a) *No prior approval requirement.* SBA will reimburse a PSB Surety for the guaranteed portion of payments the Surety makes to avoid or attempt to avoid an Imminent Breach of the terms of a Contract covered by an SBA guaranteed bond. The PSB Surety does not need SBA approval to make Imminent Breach payments.

(b) *Amount of reimbursement.* The aggregate of the payments by SBA under this section cannot exceed 10% of the Contract amount, unless the Administrator finds that a greater payment (not to exceed the guaranteed portion of the bond penalty) is necessary and reasonable. In no event will SBA make any duplicate payment under any provision of these regulations in this part.

(c) *Recordkeeping requirement.* The PSB Surety must keep records of payments made to avoid Imminent Breach.

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§ 115.70 Claims for reimbursement of Losses.

(a) *How claims are submitted.* A PSB Surety must submit claims for reimbursement on a form approved by SBA no later than 1 year from the date the Surety paid the amount. Loss is determined as of the date of receipt by SBA of the claim for reimbursement, or as of such later date as additional information requested by SBA is received. Subject to the offset provisions of part 140, SBA pays its share of Loss within 90 days of receipt of the requisite information. Claims for reimbursement and any additional information submitted are subject to review and audit by SBA.

(b) *Surety responsibilities.* The PSB Surety must take all necessary steps to mitigate Losses when legal action against a bond has been instituted, when the Obligee has declared a default, and when the Surety has established a claim reserve. The Surety may dispose of collateral at fair market value only. Unless SBA notifies the Surety otherwise, the Surety must take charge of all claims or suits arising from a defaulted bond, and compromise, settle or defend the suits. The Surety must handle and process all claims under the bond and all settlements and recoveries in the same manner as it does on non-guaranteed bonds.

(c) *Reservation of SBA's rights.* The payment by SBA of a PSB Surety's claim does not waive or invalidate any of the terms of the PSB Agreement, the regulations in this part 115, or any defense SBA may have against the Surety. Within 30 days of receipt of notification that a claim or any portion of a claim should not have been paid by SBA, the Surety must repay the specified amounts to SBA.

§ 115.71 Denial of liability.

In addition to the grounds set forth in § 115.19, SBA may deny liability to a PSB Surety if:

(a) The PSB Surety's guaranteed bond was in an amount which, together with all other guaranteed bonds, exceeded the allotment for the period during which the bond was approved, and no prior SBA approval had been obtained;

(b) The PSB Surety's loss was incurred under a bond which was not listed on the bordereau for the period when it was approved; or

(c) The loss incurred by the PSB Surety is not attributable to the particular Contract for which an SBA guaranteed bond was approved.

PART 117—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF SBA—EFFECTUATION OF THE AGE DISCRIMINATION ACT OF 1975, AS AMENDED

Sec.

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APPENDIX A TO PART 117

AUTHORITY: Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*

SOURCE: 50 FR 41648, Oct. 11, 1985, unless otherwise noted.

§ 117.1 Purpose.

The purpose of this part is to effectuate the provisions of The Age Discrimination Act of 1975, as amended (hereinafter referred to as the *Act*), to the end that no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under programs receiving financial assistance or any financial activities of the Small Business Administration to which this Act applies. The Act also permits recipients of Federal funds to continue to use certain

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age distinctions and other factors other than age which meet the requirements of the Act and these regulations in the conduct of programs and the provision of services to the public.

§ 117.2 Application of this part.

(a) This part applies to all recipients of assistance under programs administered by the Small Business Administration and to programs of financial assistance by the Small Business Administration, whether or not listed in appendix A.

(b) For the purposes of this part, the prohibition against age discrimination applies to natural persons of all ages.

(c) This part does not apply to the employment practices of any recipients.

§ 117.3 Definitions.

As used in this part:

(a) The term *act* means the Age Discrimination Act of 1975, as amended (Title III of Pub. L. 94-135).

(b) The term *action* means any act, activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration.

(c) The term *age* means how old a person is, or the number of years from the date of a person's birth.

(d) The term *age distinction* means any action using age or an age-related term.

(e) The term *age-related* means a word or words which necessarily imply a particular age or range of ages (for example, *children*, *adult*, *older persons*, but not *student*).

(f) The term *agency* means a Federal department or agency that is empowered to extend financial assistance.

(g) The term *applicant* means one who applies for Federal financial assistance.

(h) The term *Federal financial assistance* includes: (1) Grants and loans of Federal funds; (2) the grant or donation of Federal property and interests in property; (3) the detail of Federal personnel; (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration, or at a nominal consideration, or at a consideration

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which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(i) The term *normal operation* means the operation of a business or activity without significant changes that would impair its ability to meet its objectives.

(j) The term *recipient* means one who receives any Federal financial assistance under any program administered by the Small Business Administration. (See Appendix A.) The term *recipient* also shall be deemed to include *subrecipients* of SBA financial assistance.

(k) The term *SBA* means the Small Business Administration.

(l) The term *subrecipient* means any business concern that receives Federal financial assistance from the primary recipient of such financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

(m) The term *statutory objective* means the purposes of the legislation as stated in an act, statute or ordinance or can be shown in the legislative history of any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

§ 117.4 Discrimination prohibited and exceptions.

(a) *General.* To the extent that this part applies, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any business or activity receiving Federal financial assistance.

(b) *Specific discriminatory actions prohibited.* To the extent that this part applies, a recipient business or other activity may not, directly or through contractual arrangements, on the ground of age:

(1) Deny an individual any services, financial aid or other benefit provided

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by the business or other activity, except where sanctioned by one of the exceptions stated in § 117.4 (d), (e) or (f) of this section.

(2) Provide any service, financial aid or other benefit, except as sanctioned by one of the exceptions stated below, in such a way as to deny or limit persons in their efforts to participate in federally-assisted programs;

(3) Treat an individual differently from others, except as sanctioned by an exception stated below, in determining whether the person satisfied any admission, enrollment, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any service, financial aid or other benefit provided by the business or activity.

(c) The specific forms of prohibited discrimination in paragraph (b) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(d) *Exception 1.* A recipient is permitted to take an action otherwise prohibited by paragraphs (a) and (b) of this section, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a business or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a business or activity, if:

(1) Age is used as a measure or approximation of one or more other characteristics; and

(2) The other characteristic(s) must be measured or approximated in order for the normal operation of the business or activity to continue, or to achieve any statutory objective of the business or activity; and

(3) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(4) The other characteristic(s) are impractical to measure directly on an individual basis.

NOTE: All of the above factors must be met in order to exclude a business activity from the provisions of this part.

(e) *Exception 2.* A recipient is permitted to take an action otherwise prohibited by paragraphs (a) and (b) of this section which is based on a factor other

than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age if the factor bears a direct and substantial relationship to the normal operation of the business or activity or to the achievement of a statutory objective.

(f) *Exception 3.* A recipient is permitted to take an action otherwise prohibited by paragraphs (a) and (b) of this section if an age distinction is contained in that part of a Federal, State or local statute or ordinance adopted by an elected general purpose legislative body which provides any benefits or assistance to, establishes criteria for participation in, or describes intended beneficiaries or target groups in age-related terms.

(g) The burden of proving that an age distinction or other action falls within the exceptions outlined in paragraphs (d), (e), and (f) of this section on the recipient of Federal financial assistance.

§ 117.5 Illustrative applications.

(a) *Discrimination in providing financial assistance.* Development companies and small business investment companies, which apply for or receive any financial assistance may not discriminate on the ground of age in providing financial assistance to small business concerns. Such discrimination prohibited by § 117.4 includes but is not limited to the failure or refusal, because of the age of the applicant, or the age of the applicant's principal owner or operating official to extend a loan or equity financing to any business concern; or, in the case of financing which has actually been extended, the failure or refusal because of the age of the recipient, or the age of recipient's principal owner or operating official to accord the recipient fair treatment and the customary courtesies regarding such matters as default, grace periods and the like.

(b) *Discrimination in accommodations or services.* Small Business Concerns and others who or which apply for or receive any financial assistance in a program administered by the Small Business Administration, such as but not limited to physicians, dentists, hospitals, schools, libraries, and other

individuals or organizations may not discriminate in the treatment, accommodations or services they provide to their patients, students, members, passengers, or members of the public, except when the normal operation or statutory objective of the business or activity of the intended beneficiary is designated in age-related terms, whether or not operated for profit. Action by such business or activity to be excluded from compliance with this regulation must fall within the exceptions enumerated in § 117.4 (d), (e), and (f) of this part.

(c) The discrimination prohibited by § 117.5(b) includes, but is not limited to the failure or refusal, because of age, to accept a patient, student, member, customer, client, or passenger, except when the imposition of this prohibition would interfere with the normal operation of the business, e.g., pediatricians, nursery schools, geriatric clinics.

§ 117.6 Remedial and affirmative action by recipients.

(a) Where a recipient is found to have discriminated on the basis of age, the recipient shall take any remedial action which the Agency may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, both recipients may be required to take remedial action.

(b) Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's business or program on the basis of age.

(c) If a recipient operating a program which serves the elderly or children in addition to persons of other ages, provides special benefits to the elderly or to children, the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program.

§ 117.7 Assurances required.

An application for financial assistance under any program administered by the Small Business Administration

shall, as a condition of its approval and the extension of such assistance, contain or be accompanied by an assurance that the recipient will comply with this part. SBA shall specify the form of the foregoing assurance for each program, and the extent to which like assurances will be required of contractors and subcontractors, transferees, successors, and other participants in the program.

§ 117.8 Responsibilities of SBA recipients.

(a) Each SBA recipient has the primary responsibility to ensure that its programs and activities are in compliance with the Act and these regulations, and shall take steps to eliminate violations of the Act. A recipient also has responsibility to maintain records, provide information, and to afford SBA access to its records to the extent SBA finds necessary to determine whether the recipient is in compliance with the Act and these regulations. (OMB No. 3245 0076)

(b) Where a recipient passes on Federal financial assistance from SBA to subrecipients, the recipient shall provide the subrecipients written notice of their obligations under the Act and these regulations.

(c) Each recipient shall make necessary information about the Act and these regulations available to its program beneficiaries in order to inform them about the protections against discrimination provided by the Act and these regulations.

(d) Whenever an assessment indicates a violation of the Act and the SBA regulations, the recipient shall take corrective action.

§ 117.9 Compliance information.

(a) *Cooperation and assistance.* SBA shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Record Keeping.* Each recipient shall keep records in such form, and containing such information which SBA determines may be necessary to ascertain whether the recipient has complied or is complying with this part

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(OMB No. 3245 0076). In the case of a small business concern which receives financial assistance from a development company or from a small business investment company, the small business concern shall also keep such records and information as may be necessary to enable SBA to determine if the small business concern is complying with this part.

(c) Each recipient shall provide to SBA, upon request, information and reports which SBA determines are necessary to ascertain whether the recipient is complying with the Act and these regulations.

(d) *Access to sources of information.* Each recipient shall permit reasonable access by SBA during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of an applicant or recipient is in the exclusive possession of any other agency, institution or person and that agency, institution or person shall fail or refuse to furnish the information, the recipient shall so certify and shall set forth what efforts it has made to obtain the required information. The recipient will be held responsible for submitting the information. Failure to submit information or permit access to sources of information required by SBA will subject the recipient to enforcement procedure as provided in § 117.15 of this part.

(Information collection requirements in paragraph (c) were approved by the Office of Management and Budget under control number 3245-0076)

§ 117.10 Review procedures.

(a) SBA shall from time to time review the practices of recipients to determine whether they are complying with this part. As part of a compliance review or complaint investigation, SBA may require a recipient employing 15 or more full-time employees to complete a written self-evaluation, in a manner specified by the Agency, of any age distinction imposed in its program or activity receiving Federal financial assistance.

(b) If a compliance review or pre-award review indicates a violation of

the Act or these regulations, SBA will attempt to achieve voluntary compliance with the Act. If voluntary compliance with the recipient cannot be achieved, such recipient will be subject to the enforcement procedure contained in § 117.15 of these regulations. A refusal to permit an on-site compliance review during normal working hours may constitute noncompliance with this part.

§ 117.11 Complaint procedures.

(a) Any person who believes that he/she or any specific class of individuals is being or has been subjected to discrimination by SBA, a recipient, or an applicant for assistance, prohibited by this part may, by himself/herself or by a representative, file with SBA a written complaint. The complainant has the right to have a representative at all stages of the complaint procedure.

(b) A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time filing is extended by SBA. The Administrator, the Director, Office of Equal Employment Opportunity and Compliance, and the Chief, Office of Civil Rights Compliance, are the only officials who may waive the 180-day time limit for filing complaints under this part. SBA will consider the date a complaint is filed to be the date upon which the complaint is sufficient to be processed.

(c) Each complaint will be reviewed to ensure that it falls within the coverage of the Act and contains all information necessary for further processing.

(d) SBA will attempt to facilitate the filing of complaints wherever possible, including taking the following actions:

(1) Accepting as a sufficient complaint, any written statement which identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant.

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(3) Notifying the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure.

(4) Notifying the complainant and the recipient (or their representatives) of their right to contact the Chief, Office of Civil Rights Compliance, for information and assistance regarding the complaint resolution process.

(e) SBA will return to the complainant any complaint filed under the jurisdiction of this regulation, but found to be outside the jurisdiction of this regulation, and will state the reason(s) why it is outside the jurisdiction of this regulation.

§ 117.12 Mediation.

(a) SBA shall, after ensuring that the complaint falls within the coverage of this Act and all information necessary for further processing is contained therein, unless the age distinction complained of is clearly within an exception, promptly refer the complaint to the Federal Mediation and Conciliation Service (FMCS).

(b) SBA shall, to the extent possible, require the participation of the recipient and the complainant in the mediation process in an effort to reach a mutually satisfactory settlement of the complaint or make an informed judgment that an agreement is not possible. Both parties need not meet with the mediator at the same time.

(c) If the complainant and the recipient reach a mutually satisfactory resolution of the complaint during the mediation period, the mediator shall prepare a written statement of the agreement and have the complainant and recipient sign it.

(d) A copy of the written mediation agreement will be referred to SBA, and no further action will be taken unless it appears that either the complainant or the recipient (or other alleged discriminator subject to this part) fails to comply with the agreement.

(e) If at the end of 60 days after the receipt of a complaint by SBA, or at any time prior thereto, an agreement is reached or the mediator determines an agreement cannot be reached

through mediation, the agreement or complaint will be returned to SBA.

(f) This 60-day period may be extended by the mediator, with the concurrence of SBA for not more than 30 days if the mediator determines that an agreement will likely be reached during the extended period.

(g) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained during the course of the mediation process without prior approval of the head of the agency appointing the mediator.

§ 117.13 Investigation and resolution of matters.

(a) SBA will make a prompt investigation whenever a compliance review indicates a possible failure to comply with this part by the recipient and additional information is needed by SBA to assure compliance with this part, or when an unresolved complaint has been returned by the FMCS, or when it appears that the complainant or the recipient is failing to comply with a mediation agreement. The investigation shall include a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient is complying, is not complying, or has failed to comply with this part.

(b) *Resolution of matters.* If an investigation indicates a failure to comply with this part, SBA will so inform the complainant, if applicable, and the recipient that the matter will be resolved by informal means that are mutually agreeable to the parties, whenever possible.

(1) If, during the course of an investigation, the matter is resolved by informal means, SBA will put any agreement in writing and have it signed by the parties and an authorized official of SBA.

(2) If investigation indicates a violation of the Act or these regulations, SBA will attempt to achieve voluntary

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compliance. If SBA cannot achieve voluntary compliance, it will begin enforcement as described in § 117.15.

(3) If an investigation does not warrant action, SBA will so inform the complainant, if applicable, and the recipient in writing.

§ 117.14 Intimidating or retaliatory acts prohibited.

No complainant, recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this part or because an individual or group has made a complaint, testified, assisted, or participated in any manner in an investigation, review, enforcement process, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, mediation, or judicial proceeding.

§ 117.15 Procedure for effecting compliance.

(a) *General.* (1) If there appears to be a failure or threatened failure to comply with this part by an applicant or recipient and if the noncompliance or threatened noncompliance cannot be resolved by informal means, compliance with this part may be effected by suspending, terminating, or refusing any financial assistance approved but not yet disbursed to an applicant. In the case of loans partially or fully disbursed, compliance with this part may be effected by calling, canceling, terminating, accelerating repayment, or suspending in whole or in part the Federal financial assistance provided. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge.

(2) In addition, compliance may be effected by any other means authorized by law. Such other means may include, but are not limited to:

- (i) Action by SBA to accelerate the maturity of the recipient's obligation;
- (ii) Referral to the Department of Justice with a recommendation that appropriate proceedings be brought to

enforce any rights of the United States under any law of the United States or obligations of the recipient created by the Act or this part; and

(iii) Use of any requirement of or referral to any Federal, State or local government agency that will have the effect of correcting a violation of the Act or these regulations.

(3) If there appears to be a failure or threatened failure to comply with this part by an SBA program office or official, the Chief, Office of Civil Rights Compliance, through the Director, Office of Equal Employment Opportunity and Compliance, will recommend appropriate corrective action to the Administrator. Any resulting adverse action against an SBA employee shall follow Office of Personnel Management and SBA procedures for such action.

(b) *Noncompliance with §§ 117.7 and 117.9.* If an applicant fails or refuses to furnish an assurance required under § 117.7, or fails to provide information or allow SBA access to information under § 117.9 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to those sections, Federal financial assistance may be deferred for a period not to exceed 60 days after the applicant has received a notice for an opportunity for hearing under § 117.16, or unless a hearing has begun within that time, or the time for beginning the hearing has been extended by mutual consent of the recipient and the Agency, for purposes of determining what constitutes mutual consent, the Agency shall be deemed to have consented to any extension requested by the recipient and granted by the administrative law judge (hearing officer), whether or not the Agency initially approved the extension. A deferral may not continue for more than 30 days after the close of the hearing, unless the hearing results in a finding against the applicant or recipient.

(c) SBA will not take action toward accelerating repayment, suspending, terminating, or refusing financial assistance until:

- (1) SBA has advised the applicant or recipient of the failure to comply and has determined that compliance cannot be secured by voluntary means;

(2) There has been an express finding on the record, after an opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part;

(3) The action has been approved by the Administrator of SBA pursuant to § 117.17; and

(4) The expiration of 30 days after SBA has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the form of financial assistance involved, a full written report of the circumstances and the grounds for such action.

(d) Other means authorized by law. No action to effect compliance by any other means authorized by law shall be taken until:

(1) SBA has determined that compliance cannot be secured by voluntary means;

(2) The action has been approved by the Administrator or designee;

(3) The expiration of 30 days after SBA has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the form of financial assistance involved, a full written report of the circumstances and the grounds for such action;

(4) The applicant or recipient has been notified of the failure to comply, and of the action to be taken to effect compliance; and

(5) The expiration of at least 10 days from the mailing of such notice to the applicant or recipient or other person. During this period of at least 10 days from the mailing of such notice to the applicant or recipient or other person, additional efforts shall be made to persuade the applicant or recipient to comply with this part and to take such corrective action as may be appropriate.

§ 117.16 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 117.15, reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under

which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either.

(1) Fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request the Office of Hearings and Appeals (OHA) that the matter be scheduled for hearing; or

(2) Advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing and as consent to the making of a decision on the basis of such information as is available.

(b) *Time and place of hearing.* Hearings shall be held at OHA in Washington, DC, at a time fixed by OHA unless that office determines that the convenience of the complainant, applicant, recipient or SBA requires that another place be selected. Hearings shall be held before an administrative law judge designated in accordance with the Administrative Procedure Act.

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and SBA shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearings, decisions, and any administrative review shall be conducted in conformity with the Administrative Procedure Act and 13 CFR part 134. Such rules of procedure should be consistent with this section, relate to the conduct of the hearing, provide for giving of notices to those referred to in paragraph (a) of this section, taking of testimony, exhibits, arguments, and briefs, request for findings and other related matters. SBA, the complainant, if any, and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated

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in the notice for hearing, or as determined by the administrative law judge conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence may be waived by the administrative law judge conducting a hearing pursuant to this part, but rules or principles designed to assure production of the most credible evidence available, and subject testimony to test by cross-examination shall be applied where reasonably necessary. The administrative law judge may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute non-compliance or threatened noncompliance with this part, with respect to two or more forms of financial assistance to which this part applies, or non-compliance with this part and the regulations of one or more other Federal agencies issued under the Act, the Administrator may, by agreement with such other agencies, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules and procedures not inconsistent with this part. Final decisions in such cases, insofar as this part is concerned, shall be made in accordance with § 117.17.

§ 117.17 Decisions and notices.

(a) *Decision by an administrative law judge.* If the hearing is held by an administrative law judge, such administrative law judge shall either make an initial decision, if so authorized, or certify the entire record, including recommended findings and proposed decision, to the Administrator for a final decision and a copy of such initial decision or certification shall be mailed to the applicant or recipient and the complainant. Where the initial decision is

made by the administrative law judge, the applicant or recipient may, within 30 days of the mailing of such notice of initial decision, file with the Administrator exceptions to the initial decision, with the reasons therefor. In the absence of exceptions, the Administrator may, by motion within 45 days after the initial decision, serve on the applicant or recipient a notice that he/she will review the decision. Upon the filing of such exceptions or of such notice of review, the Administrator shall review the initial decision and issue his/her decision thereon, including the reasons therefor. The decision of the Administrator shall be mailed promptly to the applicant or recipient, and the complainant, if any. In the absence of either exceptions or a notice of review, the initial decision shall constitute the final decision of the Administrator.

(b) *Decisions on record or review by the Administrator.* Whenever a record is certified to the Administrator for decision or the Administrator reviews the decision of an administrative law judge pursuant to paragraph (a) of this section, or whenever the Secretary of the Department of Health and Human Services or the Department of Justice conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file briefs or other written statements of its contentions and a copy of the final decision of the Administrator shall be given in writing to the applicant or recipient and the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 117.16, a decision shall be made by the Administrator on the record and a copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of an administrative law judge or the Administrator shall set forth the ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Decision by the Administrator.* The Administrator shall make any final decision which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, acceleration repayment or the imposition of any other sanction available under the regulations or taken under other means authorized by law.

(f) *Content of orders.* The final decision may provide for accelerating of repayment, suspension or termination of, or refusal to approve, disburse, or continue Federal financial assistance, in whole or in part, under the programs involved, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this part, including provisions designed to assure that no Federal financial assistance will, thereafter, be extended under such program to the applicant or recipient determined by such decision to have failed to comply with this part, unless and until it corrects its noncompliance and satisfies the Administrator that it will fully comply with this part.

(g) *Post termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (e) of this section shall be restored to full eligibility to receive Federal financial assistance only if it satisfies the terms and conditions of that order for such eligibility and it brings itself into compliance with this regulation and provides reasonable assurance that it will fully comply with this regulation.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the Administrator to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the Administrator determines that those requirements have been satisfied, he/she shall restore such eligibility.

(3) If the Administrator denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes the

denial to have been in error. It shall there upon be given an expeditious hearing, with a decision on the record, in accordance with rules and procedures issued by the Administrator. The applicant or recipient shall be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

§ 117.18 Judicial review.

(a) The complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if:

(1) 180 days have elapsed since the complainant filed the complaint and the Agency has made no finding with regard to the complaint; or

(2) The Agency has issued a finding in favor of the recipient.

(b) If the Agency fails to make a finding within 180 days or issues a finding in favor of the recipient, the Agency shall:

(1) Advise the complainant of this fact;

(2) Advise the complainant of the right to file a civil action for injunctive relief; and

(3) Inform the complainant:

(i) That the complainant may bring a civil action only in a United States district court for the district in which the recipient is found or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that the complainant must demand these costs in the complaint;

(iii) That before commencing the action the complainant shall give 30 days notice by registered mail to the Secretary of the Department of Health and Human Services, the Attorney General of the United States and the recipient;

(iv) That the notice must state: The alleged violation of the Act; the relief requested; the court in which the complainant is bringing the action; and

whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

§ 117.19 Effect on other regulations.

(a) All regulations, orders or like directions heretofore issued by SBA which impose requirements designed to prohibit any discrimination against individuals on the grounds of age and which authorize the suspension or termination of or refusal to grant or to continue financial assistance to any applicant for or recipient of such assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this part. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Order 11246, as amended, and regulations issued thereunder;

(2) Title VI of the Civil Rights Act of 1964, as amended;

(3) The Equal Credit Opportunity Act, as amended and Regulation B of the Board of Governors of the Federal Reserve System, (12 CFR part 202);

(4) Section 504 of the Rehabilitation Act of 1973, as amended;

(5) Title VIII of the Civil Rights Act of 1968;

(6) Title IX of the Educational Amendments of 1972;

(7) Section 633(b) of the Small Business Act;

(8) Part 113 of title 13 of the Code of Federal Regulations (13 CFR part 113); or

(9) Any other statute, order, regulation or instruction, insofar as such order, regulations, or instruction prohibits discrimination on the grounds of age in any program or situation to which this part is inapplicable on any other ground.

§ 117.20 Supervision and coordination.

The Administrator may from time to time assign to officials of SBA or to officials of other agencies of the Government with the consent of such agencies, responsibilities in connection with the effectuation of the purpose of the Act and this part (other than responsibility for final decision as provided in § 117.17), including the achievement of effective coordination and maximum uniformity within SBA and within the Executive Branch of the Government in the application of the Act and this part to similar programs and in similar situations. Responsibility for administering and enforcing this part is assigned by the Administrator, to the Office of Civil Rights Compliance, Office of Equal Employment Opportunity and Compliance of the Small Business Administration.

APPENDIX A TO PART 117¹

| Name of program | Authority |
|---|--|
| Business Loans | Small Business Act, section 7(a). |
| Debtor State Development companies (501) and their small business concerns. | Small Business Investment Act, Title V. |
| Debtor State Development companies (502) and their small business concerns. | Small Business Investment Act, Title V. |
| Debtor certified development companies (503) and their small business concerns. | Small Business Investment Act, Title V. |
| Debtor small business investment companies and their small business concerns. | Small Business Investment Act, Title III. |
| Pollution Control | Small Business Investment Act, Title IV, Part A. |
| Disaster Loans: | |
| Physical, including riot | Small Business Act, section 7(b)(1). |
| Economic Injury (EIDL) | Small Business Act, section 7(b)(2). |
| Federal Action Loan Program. | Small Business Act, section 7(b)(3). |
| Small Business Institute | Small Business Act, section 8(b)(1). |
| Small Business Development Centers. | Small Business Act, section 21. |
| International Trade Program. | Small Business Act, section 22. |
| Technical and Management Assistance. | Small Business Act, section 7(j). |

¹ None of the programs administered have any age distinctions except as statutorily required.

PART 120—BUSINESS LOANS**GENERAL DESCRIPTIONS OF SBA'S BUSINESS
LOAN PROGRAMS**

Sec.

- 120.1 Which loan programs does this part cover?
- 120.2 Descriptions of the business loan programs.
- 120.3 Pilot programs.

DEFINITIONS

- 120.10 Definitions.

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AUTHORITY: 15 U.S.C 634(b)(6) and 636(a) and (h).

SOURCE: 61 FR 3235, Jan. 31, 1996, unless otherwise noted.

Small Business Administration

§ 120.10

GENERAL DESCRIPTIONS OF SBA'S BUSINESS LOAN PROGRAMS

§ 120.1 Which loan programs does this part cover?

This part regulates SBA's financial assistance to small businesses under its general business loan programs ("7(a) loans") authorized by section 7(a) of the Small Business Act ("the Act"), 15 U.S.C. 636(a), its microloan demonstration loan program ("Microloans") authorized by section 7(m) of the Act, 15 U.S.C. 636(m), and its development company program ("504 loans") authorized by Title V of the Small Business Investment Act, 15 U.S.C. 695 to 697f ("Title V"). These three programs constitute the business loan programs of the SBA.

§ 120.2 Descriptions of the business loan programs.

(a) *7(a) loans.* (1) 7(a) loans provide financing for general business purposes and may be:

- (i) A direct loan by SBA;
- (ii) An immediate participation loan by a Lender and SBA; or
- (iii) A guaranteed loan (deferred participation) by which SBA guarantees a portion of a loan made by a Lender.

(2) A guaranteed loan is initiated by a Lender agreeing to make an SBA guaranteed loan to a small business and applying to SBA for SBA's guarantee under a blanket guarantee agreement (participation agreement) between SBA and the Lender. If SBA agrees to guarantee (authorizes) a portion of the loan, the Lender funds and services the loan. If the small business defaults on the loan, SBA's guarantee requires SBA to purchase its portion of the outstanding balance, upon demand by the Lender and subject to specific conditions. Regulations specific to 7(a) loans are found in subpart B of this part.

(b) *Microloans.* SBA makes loans and loan guarantees to non-profit Intermediaries that make short-term loans up to \$25,000 to eligible small businesses for general business purposes, except payment of personal debts. SBA also makes grants to Intermediaries for use in providing management assistance and counseling to small busi-

nesses. Regulations specific to these loans are found in subpart G of this part.

(c) *504 loans.* Projects involving 504 loans require long-term fixed-asset financing for small businesses. A Certified Development Company (CDC) provides the final portion of this financing with a 504 loan made from the proceeds of a Debenture issued by the CDC, guaranteed 100 percent by SBA (with the full faith and credit of the United States), and sold to investors. The regulations specific to these loans are found in subpart H of this part.

§ 120.3 Pilot programs.

The Administrator of SBA may from time to time suspend, modify, or waive rules for a limited period of time to test new programs or ideas. The Administrator shall publish a document in the FEDERAL REGISTER explaining the reasons for these actions.

DEFINITIONS

§ 120.10 Definitions.

The following terms have the same meaning wherever they are used in this part. Defined terms are capitalized wherever they appear.

Associate. (1) An Associate of a Lender or CDC is:

- (i) An officer, director, key employee, or holder of 20 percent or more of the value of the Lender's or CDC's stock or debt instruments, or an agent involved in the loan process;
- (ii) Any entity in which one or more individuals referred to in paragraphs (1)(i) of this definition or a Close Relative of any such individual owns or controls at least 20 percent.

(2) An Associate of a small business is:

- (i) An officer, director, owner of more than 20 percent of the equity, or key employee of the small business;
- (ii) Any entity in which one or more individuals referred to in paragraphs (2)(i) of this definition owns or controls at least 20 percent; and
- (iii) Any individual or entity in control of or controlled by the small business (except a Small Business Investment Company ("SBIC") licensed by SBA).

(3) For purposes of this definition, the time during which an Associate relationship exists commences six months before the following dates and continues as long as the certification, participation agreement, or loan is outstanding:

(i) For a CDC, the date of certification by SBA;

(ii) For a Lender, the date of application for a loan guarantee on behalf of an applicant; or

(iii) For a small business, the date of the loan application to SBA, the CDC, the Intermediary, or the Lender.

Authorization is SBA's written agreement providing the terms and conditions under which SBA will make or guarantee business loans. It is not a contract to make a loan.

Borrower is the obligor of an SBA business loan.

Certified Development Company ("CDC") is an entity authorized by SBA to deliver 504 financing to small businesses.

Close Relative is a spouse; a parent; or a child or sibling, or the spouse of any such person.

Eligible Passive Company is a small entity or trust which does not engage in regular and continuous business activity, which leases real or personal property to an Operating Company for use in the Operating Company's business, and which complies with the conditions set forth in § 120.111.

Intermediary is the entity in the Microloan program that receives SBA financial assistance and makes loans to small businesses in amounts up to \$25,000.

Lender is an institution that has executed a participation agreement with SBA under the guaranteed loan program.

Loan Instruments are the Authorization, note, instruments of hypothecation, and all other agreements and documents related to a loan.

Operating Company is an eligible small business actively involved in conducting business operations now or about to be located on real property owned by an Eligible Passive Company, or using or about to use in its business operations personal property owned by an Eligible Passive Company.

Preference is any arrangement giving a Lender or a CDC a preferred position compared to SBA relating to the making, servicing, or liquidation of a business loan with respect to such things as repayment, collateral, guarantees, control, maintenance of a compensating balance, purchase of a Certificate of deposit or acceptance of a separate or companion loan, without SBA's consent.

Rentable Property is the total square footage of all buildings or facilities used for business operations.

Rural Area is a political subdivision or unincorporated area in a non-metropolitan county (as defined by the Department of Agriculture), or, if in a metropolitan county, any such subdivision or area with a resident population under 20,000 which is designated by SBA as rural.

Service Provider is an entity that contracts with a Lender or CDC to perform management, marketing, legal or other services.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2117, Jan. 13, 1999]

Subpart A—Policies Applying to All Business Loans

ELIGIBILITY REQUIREMENTS

§ 120.100 What are the basic eligibility requirements for all applicants for SBA business loans?

To be eligible for an SBA business loan, a small business applicant must:

(a) Be an operating business (except for loans to Eligible Passive Companies);

(b) Be organized for profit;

(c) Be located in the United States;

(d) Be small under the size requirements of part 121 of this chapter (including affiliates). See subpart H of this part for the size standards of part 121 of this chapter which apply only to 504 loans; and

(e) Be able to demonstrate a need for the desired credit.

§ 120.101 Credit not available elsewhere.

SBA provides business loan assistance only to applicants for whom the

desired credit is not otherwise available on reasonable terms from non-Federal sources. SBA requires the Lender or CDC to certify or otherwise show that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal sources without SBA assistance, taking into consideration the prevailing rates and terms in the community in or near where the applicant conducts business, for similar purposes and periods of time. Submission of an application to SBA by a Lender or CDC constitutes certification by the Lender or CDC that it has examined the availability of credit to the applicant, has based its certification upon that examination, and has substantiation in its file to support the certification.

§ 120.102 Funds not available from alternative sources, including personal resources of principals.

(a) An applicant for a business loan must show that the desired funds are not available from the personal resources of any owner of 20 percent or more of the equity of the applicant. SBA will require the use of personal resources from any such owner as an injection to reduce the SBA funded portion of the total financing package (*i.e.*, any SBA loans and any other financing, including loans from any other source) when that owner's liquid assets exceed the amounts specified in paragraphs (a) (1) through (3) of this section. When the total financing package:

(1) Is \$250,000 or less, each 20 percent owner of the applicant must inject any personal liquid assets which are in excess of two times the total financing package or \$100,000, whichever is greater;

(2) Is between \$250,001 and \$500,000, each 20 percent owner of the applicant must inject any personal liquid assets which are in excess of one and one-half times the total financing package or \$500,000, whichever is greater;

(3) Exceeds \$500,000, each 20 percent owner of the applicant must inject any personal liquid assets which are in excess of one times the total financing package or \$750,000, whichever is greater.

(b) Any liquid assets in excess of the applicable amount set forth in paragraph (a) of this section must be used to reduce the SBA portion of the total financing package. These funds must be injected prior to the disbursement of the proceeds of any SBA financing.

(c) For purposes of this section, liquid assets means cash or cash equivalent, including savings accounts, CDs, stocks, bonds, or other similar assets. Equity in real estate holdings and other fixed assets are not to be considered liquid assets.

§ 120.103 Are farm enterprises eligible?

Federal financial assistance to agricultural enterprises is generally made by the United States Department of Agriculture (USDA), but may be made by SBA under the terms of a Memorandum of Understanding between SBA and USDA. Farm-related businesses which are not agricultural enterprises are eligible businesses under SBA's business loan programs.

§ 120.104 Are businesses financed by SBICs eligible?

SBA may make or guarantee loans to a business financed by an SBIC if SBA's collateral position will be superior to that of the SBIC. SBA may also make or guarantee a loan to an otherwise eligible small business which temporarily is owned or controlled by an SBIC under the regulations in part 107 of this chapter. SBA neither guarantees SBIC loans nor makes loans jointly with SBICs.

§ 120.105 Special consideration for veterans.

SBA will give special consideration to a small business owned by a veteran or, if the veteran chooses not to apply, to a business owned or controlled by one of the veteran's dependents. If the veteran is deceased or permanently disabled, SBA will give special consideration to one survivor or dependent. SBA will process the application of a business owned or controlled by a veteran or dependent promptly, resolve close questions in the applicant's favor, and pay particular attention to maximum loan maturity. For SBA loans, a veteran is a person honorably discharged from active military service.

INELIGIBLE BUSINESSES AND ELIGIBLE
PASSIVE COMPANIES

§ 120.110 What businesses are ineligible for SBA business loans?

The following types of businesses are ineligible:

- (a) Non-profit businesses (for-profit subsidiaries are eligible);
- (b) Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);
- (c) Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111);
- (d) Life insurance companies;
- (e) Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);
- (f) Pyramid sale distribution plans;
- (g) Businesses deriving more than one-third of gross annual revenue from legal gambling activities;
- (h) Businesses engaged in any illegal activity;
- (i) Private clubs and businesses which limit the number of memberships for reasons other than capacity;
- (j) Government-owned entities (except for businesses owned or controlled by a Native American tribe);
- (k) Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;
- (l) Consumer and marketing cooperatives (producer cooperatives are eligible);
- (m) Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;
- (n) Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;
- (o) Businesses in which the Lender or CDC, or any of its Associates owns an equity interest;
- (p) Businesses which:
 - (1) Present live performances of a prurient sexual nature; or

(2) Derive directly or indirectly more than *de minimis* gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;

(q) Unless waived by SBA for good cause, businesses that have previously defaulted on a Federal loan or Federally assisted financing, resulting in the Federal government or any of its agencies or Departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its Associates which previously owned, operated, or controlled a business which defaulted on a Federal loan (or guaranteed a loan which was defaulted) and caused the Federal government or any of its agencies or Departments to sustain a loss in any of its programs. For purposes of this section, a compromise agreement shall also be considered a loss;

(r) Businesses primarily engaged in political or lobbying activities; and

(s) Speculative businesses (such as oil wildcatting).

§ 120.111 What conditions must an Eligible Passive Company satisfy?

An Eligible Passive Company must use loan proceeds to acquire or lease, and/or improve or renovate, real or personal property (including eligible refinancing), that it leases to one or more Operating Companies for conducting the Operating Company's business (references to Operating Company in paragraphs (a) and (b) of this section mean each Operating Company). Any ownership structure or legal form may qualify as an Eligible Passive Company.

(a) Conditions that apply to all legal forms:

(1) The Operating Company must be an eligible small business, and the proposed use of the proceeds must be an eligible use if the Operating Company were obtaining the financing directly;

(2) The Eligible Passive Company (with the exception of a trust) and the Operating Company each must be small under the appropriate size standards in part 121 of this chapter;

(3) The lease between the Eligible Passive Company and the Operating Company must be in writing and must be subordinated to SBA's mortgage, trust deed lien, or security interest on

the property. Also, the Eligible Passive Company (as landlord) must furnish as collateral for the loan an assignment of all rents paid under the lease;

(4) The lease between the Eligible Passive Company and the Operating Company, including options to renew exercisable solely by the Operating Company, must have a remaining term at least equal to the term of the loan;

(5) The Operating Company must be a guarantor or a co-borrower (with the Eligible Passive Company) of the loan (in a 7(a) loan including working capital, the Operating Company must be a co-borrower); and

(6) Each holder of an ownership interest constituting at least 20 percent of the Eligible Passive Company and the Operating Company must guarantee the loan (the trustee shall execute the guarantee on behalf of any trust).

(b) *Additional conditions that apply to trusts.* The eligibility status of the trustor will determine trust eligibility. All donors to the trust will be deemed to have trustor status for eligibility purposes. A trust qualifying as an Eligible Passive Company may engage in other activities as authorized by its trust agreement. The trustee must warrant and certify that the trust will not be revoked or substantially amended for the term of the loan without the consent of SBA. The trustor must guarantee the loan. For purposes of this section, the trustee shall certify to SBA that:

(1) The trustee has authority to act;

(2) The trust has the authority to borrow funds, pledge trust assets, and lease the property to the Operating Company;

(3) The trustee has provided accurate, pertinent language from the trust agreement confirming the above; and

(4) The trustee has provided and will continue to provide SBA with a true and complete list of all trustors and donors.

[61 FR 3235, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996, as amended at 64 FR 2117, Jan. 13, 1999]

USES OF PROCEEDS

§ 120.120 What are eligible uses of proceeds?

A small business must use an SBA business loan for sound business pur-

poses. The uses of proceeds are prescribed in each loan's Authorization.

(a) A Borrower may use loan proceeds from any SBA loan to:

(1) Acquire land (by purchase or lease);

(2) Improve a site (e.g., grading, streets, parking lots, landscaping), including up to 5 percent for community improvements such as curbs and sidewalks;

(3) Purchase one or more existing buildings;

(4) Convert, expand or renovate one or more existing buildings;

(5) Construct one or more new buildings; and/or

(6) Acquire (by purchase or lease) and install fixed assets (for a 504 loan, these assets must have a useful life of at least 10 years and be at a fixed location, although short-term financing for equipment, furniture, and furnishings may be permitted where essential to and a minor portion of the 504 Project).

(b) A Borrower may also use 7(a) and microloan proceeds for:

(1) Inventory;

(2) Supplies;

(3) Raw materials; and

(4) Working capital (if the Operating Company is a co-Borrower with an Eligible Passive Company, part of the loan proceeds may be applied for working capital if used for that purpose only by the Operating Company).

(c) A Borrower may use 7(a) loan proceeds for refinancing certain outstanding debts.

§ 120.130 Restrictions on uses of proceeds.

SBA will not authorize nor may a Borrower use loan proceeds for the following purposes (including the replacement of funds used for any such purpose):

(a) Payments, distributions or loans to Associates of the applicant (except for ordinary compensation for services rendered);

(b) Refinancing a debt owed to a Small Business Investment Company ("SBIC");

(c) Floor plan financing or other revolving line credit, except under § 120.390;

(d) Investments in real or personal property acquired and held primarily

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for sale, lease, or investment (except for a loan to an Eligible Passive Company or to a small contractor under § 120.310);

(e) A purpose which does not benefit the small business; or

(f) Any use restricted by §§ 120.201 through 120.203 and 120.884 (specific to 7(a) loans and 504 loans respectively).

§ 120.131 Leasing part of new construction or existing building to another business.

(a) If the SBA business loan involves the construction of a new building, a Borrower may lease up to 33 percent of the Rentable Property for a short term to any third party if reasonable growth projections show that the Borrower will need additional space within three years and will use all of the additional space within ten years. If the Borrower is an Eligible Passive Company leasing 100 percent of the Project space to one or more Operating Company, the Operating Company, or Operating Companies together, may sublease up to 33 percent of the Rentable Property to a third party under the same conditions. (See § 120.870(c) for an exception with respect to 504 Projects.)

(b) If the SBA business loan involves the acquisition, renovation, or reconstruction of an existing building, the Borrower may lease up to 49 percent of the Rentable Property long term. If the Borrower is an Eligible Passive Company leasing 100 percent of the Project space to one or more Operating Companies, the Operating Company, or Operating Companies together may sublease up to 49 percent of its Rentable Property to a third party under the same conditions. (For 504 loans, see § 120.871).

[64 FR 2117, Jan. 13, 1999; 64 FR 27445, May 20, 1999]

ETHICAL REQUIREMENTS

§ 120.140 What ethical requirements apply to participants?

Lenders, Intermediaries, CDCs, and Associate Development Companies (“ADCs”) (in this section, collectively referred to as “Participants”), must act ethically and exhibit good character. Ethical indiscretion of an Associate of a Participant or a member of a

CDC will be attributed to the Participant. A Participant must promptly notify SBA if it obtains information concerning the unethical behavior of an Associate. The following are examples of such unethical behavior. A Participant may not:

(a) Self-deal;

(b) Have a real or apparent conflict of interest with a small business with which it is dealing (including any of its Associates or an Associate’s Close Relatives) or SBA;

(c) Own an equity interest in a business that has received or is applying to receive SBA financing (during the term of the loan or within 6 months prior to the loan application);

(d) Be incarcerated, on parole, or on probation;

(e) Knowingly misrepresent or make a false statement to SBA;

(f) Engage in conduct reflecting a lack of business integrity or honesty;

(g) Be a convicted felon, or have an adverse final civil judgment (in a case involving fraud, breach of trust, or other conduct) that would cause the public to question the Participant’s business integrity, taking into consideration such factors as the magnitude, repetition, harm caused, and remoteness in time of the activity or activities in question;

(h) Accept funding from any source that restricts, prioritizes, or conditions the types of small businesses that the Participant may assist under an SBA program or that imposes any conditions or requirements upon recipients of SBA assistance inconsistent with SBA’s loan programs or regulations;

(i) Fail to disclose to SBA all relationships between the small business and its Associates (including Close Relatives of Associates), the Participant, and/or the lenders financing the Project of which it is aware or should be aware;

(j) Fail to disclose to SBA whether the loan will:

(1) Reduce the exposure of a Participant or an Associate of a Participant in a position to sustain a loss;

(2) Directly or indirectly finance the purchase of real estate, personal property or services (including insurance) from the Participant or an Associate of the Participant;

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(3) Repay or refinance a debt due a Participant or an Associate of a Participant; or

(4) Require the small business, or an Associate (including Close Relatives of Associates), to invest in the Participant (except for institutions which require an investment from all members as a condition of membership, such as a Production Credit Association);

(k) Issue a real estate forward commitment to a builder or developer; or

(l) Engage in any activity which taints its objective judgment in evaluating the loan.

CREDIT CRITERIA FOR SBA LOANS

§ 120.150 What are SBA's lending criteria?

The applicant (including an Operating Company) must be creditworthy. Loans must be so sound as to reasonably assure repayment. SBA will consider:

(a) Character, reputation, and credit history of the applicant (and the Operating Company, if applicable), its Associates, and guarantors;

(b) Experience and depth of management;

(c) Strength of the business;

(d) Past earnings, projected cash flow, and future prospects;

(e) Ability to repay the loan with earnings from the business;

(f) Sufficient invested equity to operate on a sound financial basis;

(g) Potential for long-term success;

(h) Nature and value of collateral (although inadequate collateral will not be the sole reason for denial of a loan request); and

(i) The effect any affiliates (as defined in part 121 of this chapter) may have on the ultimate repayment ability of the applicant.

§ 120.151 What is the statutory limit for total loans to a Borrower?

The aggregate amount of the SBA portions of all loans to a single Borrower, including the Borrower's affiliates as defined in part 121 of this chapter, may not exceed a guarantee amount of \$750,000, except as otherwise authorized by statute for a specific loan program. The amount of any loan received by an Eligible Passive Company applies to the loan limit of both

the Eligible Passive Company and the Operating Company.

§ 120.160 Loan conditions.

The following requirements are normally required by SBA for all business loans:

(a) *Personal guarantees.* Holders of at least a 20 percent ownership interest generally must guarantee the loan. SBA, in its discretion, consulting with the Participating Lender, may require other appropriate individuals to guarantee the loan as well, except SBA will not require personal guarantees from those owning less than 5% ownership.

(b) *Appraisals.* SBA may require professional appraisals of the applicant's and principals' assets, a survey, or a feasibility study.

(c) *Hazard Insurance.* SBA requires hazard insurance on all collateral.

(d) *Taxes.* The applicant may not use any of the proceeds to pay past-due Federal and state payroll taxes.

REQUIREMENTS IMPOSED UNDER OTHER LAWS AND ORDERS

§ 120.170 Flood insurance.

Under the Flood Disaster Protection Act of 1973 (Sec. 205(b) of Pub. L. 93-234; 87 Stat. 983 (42 U.S.C. 4000 *et seq.*)), a loan recipient must obtain flood insurance if any building (including mobile homes), machinery, or equipment acquired, installed, improved, constructed, or renovated with the proceeds of SBA financial assistance is located in a special flood hazard area. The requirement applies also to any inventory (business loan program), fixtures or furnishings contained or to be contained in the building. Mobile homes on a foundation are buildings. SBA, Lenders, CDCs, and Intermediaries must notify Borrowers that flood insurance must be maintained.

§ 120.171 Compliance with child support obligations.

Any holder of 50% or more of the ownership interest in the recipient of an SBA loan must certify that he or she is not more than 60 days delinquent on any obligation to pay child support arising under:

(a) An administrative order;

(b) A court order;

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(c) A repayment agreement between the holder and a custodial parent; or

(d) A repayment agreement between the holder and a State agency providing child support enforcement services.

§ 120.172 Flood-plain and wetlands management.

(a) All loans must conform to requirements of Executive Orders 11988, "Flood Plain Management" (3 CFR, 1977 Comp., p. 117) and 11990, "Protection of Wetlands" (3 CFR, 1977 Comp., p. 121). Lenders, Intermediaries, CDCs, and SBA must comply with requirements applicable to them. Applicants must show:

(1) Whether the location for which financial assistance is proposed is in a floodplain or wetland;

(2) If it is in a floodplain, that the assistance is in compliance with local land use plans; and

(3) That any necessary construction or use permits will be issued.

(b) Generally, there is an 8-step decision making process with respect to:

(1) Construction or acquisition of anything, other than a building;

(2) Repair and restoration equal to more than 50% of the market value of a building; or

(3) Replacement of destroyed structures.

(c) SBA may determine for the following types of actions, on a case-by-case basis, that the full 8-step process is not warranted and that only the first step (determining if a proposed action is in the base floodplain) need be completed:

(1) Actions located outside the base floodplain;

(2) Repairs, other than to buildings, that are less than 50% of the market value;

(3) Replacement of building contents, materials, and equipment;

(4) Hazard mitigation measures;

(5) Working capital loans; or

(6) SBA loan assistance of \$1,500,000 or less.

§ 120.173 Lead-based paint.

If loan proceeds are for the construction or rehabilitation of a residential structure, lead-based paint may not be

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used on any interior surface, or on any exterior surface that is readily accessible to children under the age of seven years.

§ 120.174 Earthquake hazards.

When loan proceeds are used to construct a new building or an addition to an existing building, the construction must conform with the "National Earthquake Hazards Reduction Program ("NEHRP") Recommended Provisions for the Development of Seismic Regulations for New Buildings" (which can be obtained from the Federal Emergency Management Agency, Publications Office, Washington, DC) or a code identified by SBA as being substantially equivalent.

§ 120.175 Coastal barrier islands.

SBA and Intermediaries may not make or guarantee any loan within the Coastal Barrier Resource System.

§ 120.176 Compliance with other laws.

All SBA loans are subject to all applicable laws, including (without limitation) the civil rights laws (see parts 112, 113, 117 and 136 of this chapter), prohibiting discrimination on the grounds of race, color, national origin, religion, sex, marital status, disability or age. SBA requests agreements or evidence to support or document compliance with these laws, including reports required by applicable statutes or the regulations in this chapter.

ENFORCEABILITY DESPITE RULE CHANGES

§ 120.180 Are rules enforceable if they are changed later?

Regulations and contractual provisions in effect at the time of a transaction govern an SBA loan financing transaction, notwithstanding subsequent rule or contract changes. SBA may conduct an enforcement action regarding any violation of provisions of regulations or contracts applicable at the time, but no longer in effect or in use.

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LOAN APPLICATIONS

§ 120.190 Where does an applicant apply for a loan?

An applicant for a business loan should apply to:

- (a) A Lender for a guaranteed or immediate participation loan;
 - (b) A CDC for a 504 loan;
 - (c) An Intermediary for a Microloan;
- or
- (d) SBA for a direct loan.

§ 120.191 The contents of a business loan application.

For most business loans, SBA requires that an application for a business loan contain, among other things, a description of the history and nature of the business, the amount and purpose of the loan, the collateral offered for the loan, current financial statements, historical financial statements (or tax returns if appropriate) for the past three years, IRS tax verification, and a business plan, when applicable. Personal histories and financial statements will be required from principals of the applicant (and the Operating Company, if applicable).

§ 120.192 Approval or denial.

Applicants receive notice of approval or denial by the Lender, CDC, Intermediary, or SBA, as appropriate. Notice of denial will include the reasons. If a loan is approved, an Authorization will be issued.

§ 120.193 Reconsideration after denial.

An applicant or recipient of a business loan may request reconsideration of a denied loan or loan modification request within 6 months of denial. Applicants denied due to a size determination can appeal that determination under part 121 of this chapter. All others must be submitted to the office that denied the original request. To prevail, the applicant must demonstrate that it has overcome all legitimate reasons for denial. Six months after denial, a new application is required. If the reconsideration is denied, a second and final reconsideration may be considered by the Associate Administrator for Financial Assistance (AA/FA), whose decision is final.

COMPUTERIZED SBA FORMS

§ 120.194 Use of computer forms.

Any Applicant or Participant may use computer generated SBA application forms, closing forms, and other forms designated by SBA if the forms are exact reproductions of SBA forms.

REPORTING OF FEES

§ 120.195 Disclosure of fees.

An Applicant for a business loan must identify to SBA the name of each Agent as defined in part 103 of this chapter that helped the applicant obtain the loan, describing the services performed, and disclosing the amount of each fee paid or to be paid by the applicant to the Agent in conjunction with the performance of those services.

Subpart B—Policies Specific to 7(a) Loans

BONDING REQUIREMENTS

§ 120.200 What bonding requirements exist during construction?

On 7(a) loans which finance construction, the Borrower must supply a 100 percent payment and performance bond and builder's risk insurance, unless waived by SBA.

LIMITATIONS ON USE OF PROCEEDS

§ 120.201 Refinancing unsecured or undersecured loans.

A Borrower may not use 7(a) loan proceeds to pay any creditor in a position to sustain a loss causing a shift to SBA of all or part of a potential loss from an existing debt.

§ 120.202 Restrictions on loans for changes in ownership.

A Borrower may not use 7(a) loan proceeds to purchase a portion of a business or a portion of another owner's interest. One or more current owners may use loan proceeds to purchase the entire interest of another current owner, or a Borrower can purchase ownership of an entire business.

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MATURITIES; INTEREST RATES; LOAN
AND GUARANTEE AMOUNTS

§ 120.210 What percentage of a loan may SBA guarantee?

SBA's guarantee percentage must not exceed the applicable percentage established in section 7(a) of the Act. The maximum allowable guarantee percentage on a loan will be determined by the loan amount. As of October 12, 1995, the percentages are: Loans of \$100,000 or less may receive a maximum guarantee of 80 percent. All other loans may receive a maximum guarantee of 75 percent, not to exceed \$750,000, unless otherwise authorized by SBA.

§ 120.211 What limits are there on the amounts of direct loans?

(a) The statutory limit for direct loans made under the authority of section 7(a)(1)-(19) of the Small Business Act is \$350,000. SBA has established an administrative limit of \$150,000 for direct loans. The AA/FA may authorize acceptance of an application up to the statutory limit.

(b) The statutory limit for direct loans made under the authority of section 7(a)(20) is \$750,000. SBA has established an administrative limit of \$150,000. The Associate Administrator for Minority Enterprise Development may authorize the acceptance of an application that exceeds the administrative limit.

(c) The statutory limit on SBA's portion of an immediate participation loan is \$350,000. The administrative limit is the lesser of 75 percent of the loan or \$150,000. The AA/FA may authorize exceptions to the administrative limit up to \$350,000.

§ 120.212 What limits are there on loan maturities?

The term of a loan shall be:

(a) The shortest appropriate term, depending upon the Borrower's ability to repay;

(b) Ten years or less, unless it finances or refinances real estate or equipment with a useful life exceeding ten years; and

(c) A maximum of 25 years, including extensions. (A portion of a loan used to acquire or improve real property may

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have a term of 25 years plus an additional period needed to complete the construction or improvements.)

§ 120.213 What fixed interest rates may a Lender charge?

(a) *Fixed Rates for Guaranteed Loans.* A loan may have a reasonable fixed interest rate. SBA periodically publishes the maximum allowable rate in the FEDERAL REGISTER.

(b) *Direct loans.* A statutory formula based on the cost of money to the Federal government determines the interest rate on direct loans. SBA publishes the rate periodically in the FEDERAL REGISTER.

§ 120.214 What conditions apply for variable interest rates?

A Lender may use a variable rate of interest, upon SBA's approval. SBA's maximum allowable rates apply only to the initial rate on the date SBA received the loan application. SBA shall approve the use of a variable interest rate under the following conditions:

(a) *Frequency.* The first change may occur on the first calendar day of the month following initial disbursement, using the base rate (see paragraph (c) of this section) in effect on the first business day of the month. After that, changes may occur no more often than monthly.

(b) *Range of fluctuation.* The amount of fluctuation shall be equal to the movement in the base rate. The difference between the initial rate and the ceiling rate may be no greater than the difference between the initial rate and the floor rate.

(c) *Base rate.* The base rate shall be the prime rate in effect on the first business day of the month, printed in a national financial newspaper published each business day, or the SBA Optional Peg Rate which SBA publishes quarterly in the FEDERAL REGISTER.

(d) *Maturities under 7 years.* For loans with maturities under seven years, the maximum interest rate shall not exceed two and one-quarter (2 1/4) percentage points over the base rate.

(e) *Maturities of 7 years or more.* For loans with maturities of seven or more years, the maximum interest rate shall not exceed two and three-quarters (2 3/4)

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4) percentage points over the base rate.

(f) *Amortization.* Initial amortization of principal and interest may be recomputed and reassessed as interest rates fluctuate, as directed by SBA. With prior approval of SBA, the Lender may use certain other amortization methods, except that SBA does not allow balloon payments.

§ 120.215 What interest rates apply to smaller loans?

For a loan over \$25,000 but not exceeding \$50,000, the interest rate may

be one percent more than the maximum interest rate described above. For a loan of \$25,000 or less, the maximum interest rate described above may be increased by two percentage points.

[61 FR 3235, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996]

FEES FOR GUARANTEED LOANS

§ 120.220 Fees that Lender pays SBA.

(a) The Lender pays a guarantee fee to SBA for each loan as follows:

| Guaranteed portion of loan | Fee measured as percentage of guaranteed portion | When payable | Lender may get fee from borrower | When SBA refunds fee from borrower |
|---|--|--|----------------------------------|--|
| 12 Months or less | .25% | With Guarantee Application. Within 90 days of SBA Approval. | When SBA Approves Loan. | If Application Withdrawn or Denied. ¹ |
| More Than 12 months and Total Guaranteed Portion Is \$60,000 or Less. | 2.0% of Guaranteed Portion | Within 90 days of SBA Approval. | After First Disbursement. | If Loan Cancelled and Never Disbursed. |
| More Than 12 Months and Amount of Guaranteed Portion of Loan That Is \$250,000 or Less. | 3% | Within 90 Days of SBA Approval. | After First Disbursement. | If Loan Cancelled and Never Disbursed. |
| More Than 12 Months and Amount of Guaranteed Portion of Loan Between \$250,000 and \$500,000. | 3.0% of 1st \$250,000 plus 3.5% of balance | Within 90 Days of SBA Approval. | After First Disbursement. | If Loan Cancelled and Never Disbursed. |
| More Than 12 Months and Amount of Guaranteed Portion of Loan Exceeding \$500,000. | 3.0% of 1st \$250,000 plus 3.5% of next \$250,000 plus 3.875% of the Amount Exceeding \$500,000. | Within 90 Days of SBA Approval. | After First Disbursement. | If Loan Cancelled and Never Disbursed. |

¹ Also, if SBA substantially changes the Lender's loan terms and approves the loan, but the modified terms are unacceptable to the Borrower or Lender. (The Lender must request refund in writing within 30 calendar days of the approval).

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(b) If the guarantee fee is not paid, SBA may terminate the guarantee. The Borrower may use working capital loan proceeds to reimburse the Lender for the guarantee fee. Acceptance of the guarantee fee by SBA shall not waive any right of SBA arising from the Lender's misconduct or violation of any provision of this part, the guarantee agreement, the Authorization, or other loan documents.

(c) The Lender shall also pay SBA an annual service fee equal to 0.5 percent of the outstanding balance of the guaranteed portion of each loan. The service fee cannot be charged to the Borrower. SBA may institute a late fee charge for delinquent payments of the annual service fee to cover administrative costs associated with collecting delinquent fees.

[61 FR 3235, Jan. 31, 1996; 61 FR 11471, Mar. 20, 1996]

§ 120.221 Fees which the Lender may collect from a loan applicant.

(a) *Service and packaging fees.* The Lender may charge an applicant reasonable fees (customary for similar Lenders in the geographic area where the loan is being made) for packaging and other services. The Lender must advise the applicant in writing that the applicant is not required to obtain or pay for unwanted services. The applicant is responsible for deciding whether fees are reasonable. SBA may review these fees at any time. Lender must refund any such fee considered unreasonable by SBA.

(b) *Extraordinary servicing.* Subject to prior written SBA approval, if all or part of a loan will have extraordinary servicing needs, the Lender may charge the applicant a service fee not to exceed 2 percent per year on the outstanding balance of the part requiring special servicing.

(c) *Out-of-pocket expenses.* The Lender may collect from the applicant necessary out-of-pocket expenses such as filing or recording fees.

(d) *Late payment fee.* The Lender may charge the Borrower a late payment fee not to exceed 5 percent of the regular loan payment.

(e) *No prepayment fee.* The Lender may not charge a fee for full or partial prepayment of a loan.

§ 120.222 Fees which the Lender or Associate may not collect from the Borrower or share with third parties.

The Lender or its Associate may not:

(a) Require the applicant or Borrower to pay the Lender, an Associate, or any party designated by either, any fees or charges for goods or services, including insurance, as a condition for obtaining an SBA guaranteed loan (unless permitted by this part);

(b) Charge an applicant any commitment, bonus, broker, commission, referral or similar fee;

(c) Charge points or add-on interest;

(d) Share any premium received from the sale of an SBA guaranteed loan in the secondary market with a Service Provider, packager, or other loan-referral source; or

(e) Charge the Borrower for legal services, unless they are hourly charges for requested services actually rendered.

Subpart C—Special Purpose Loans

§ 120.300 Statutory authority.

Congress has authorized several special purpose programs in various subsections of section 7(a) of the Act. Generally, 7(a) loan policies, eligibility requirements and credit criteria enumerated in subpart B of this part apply to these programs. The sections of this subpart prescribe the special conditions applying to each special purpose program. As with other business loans, special purpose loans are available only to the extent funded by annual appropriations.

DISABLED ASSISTANCE LOAN PROGRAM (DAL)

§ 120.310 What assistance is available for the disabled?

Section 7(a)(10) of the Act authorizes SBA to guarantee or make direct loans to the disabled. SBA distinguishes two kinds of assistance:

(a) *DAL-1.* DAL-1 Financial Assistance is available to non-profit public or private organizations for disabled individuals that employ such individuals; or

(b) *DAL-2.* DAL-2 Financial Assistance is available to:

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- (1) Small businesses wholly owned by disabled individuals; and
- (2) Disabled individuals to establish, acquire, or operate a small business.

§ 120.311 Definitions.

(a) *Organization for the disabled* means one which:

- (1) Is organized under federal or state law to operate in the interest of disabled individuals;
- (2) Is non-profit;
- (3) Employs disabled individuals for seventy-five percent of the time needed to produce commodities or services for sale; and
- (4) Complies with occupational and safety standards prescribed by the Department of Labor.

(b) *Disabled individual* means a person who has a permanent physical, mental or emotional impairment, defect, ailment, disease or disability which limits the type of employment for which the person would otherwise be qualified.

§ 120.312 DAL-1 use of proceeds and other program conditions.

(a) DAL-1 applicants must submit appropriate documents to establish program eligibility.

(b) Generally, applicants may use loan proceeds for any 7(a) loan purposes. Loan proceeds may not be used:

(1) To purchase or construct facilities if construction grants and mortgage assistance are available from another Federal source; or

(2) For supportive services (expenses incurred by a DAL-1 organization to subsidize wages of low producers, health and rehabilitation services, management, training, education, and housing of disabled workers).

(c) SBA does not consider a DAL-1 organization to have a conflict of interest if one or more of its Associates is an Associate of the Lender.

§ 120.313 DAL-2 use of proceeds and other program conditions.

(a) The DAL-2 loan proceeds may be used for any 7(a) loan purposes.

(b) An applicant may use DAL-2 loan proceeds to acquire an eligible small business without complying with the change of ownership conditions in § 120.202.

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(c) A DAL-2 applicant must submit evidence from a physician, psychiatrist, or other qualified professional as to the permanent nature of the disability and the limitation it places on the applicant.

§ 120.314 Resolving doubts about creditworthiness.

For the purpose of the DAL Program, SBA shall resolve doubts concerning the creditworthiness of an applicant in favor of the applicant. However, the applicant must present satisfactory evidence of repayment ability. Personal guarantees of Associates are not required for purposes of DAL-1 financial assistance.

§ 120.315 Interest rate and loan limit.

The interest rate on direct DAL loans is three percent. There is an administrative limit of \$150,000 on a direct DAL loan.

BUSINESSES OWNED BY LOW INCOME INDIVIDUALS

§ 120.320 Policy.

Section 7(a)(11) of the Act authorizes SBA to guarantee or make direct loans to establish, preserve or strengthen small business concerns:

(a) Located in an area having high unemployment according to the Department of Labor;

(b) Located in an area in which a high percentage of individuals have a low income inadequate to satisfy basic family needs; and

(c) More than 50 percent owned by low income individuals.

ENERGY CONSERVATION

§ 120.330 Who is eligible for an energy conservation loan?

SBA may make or guarantee loans to assist a small business to design, engineer, manufacture, distribute, market, install, or service energy devices or techniques designed to conserve the Nation's energy resources.

§ 120.331 What devices or techniques are eligible for a loan?

Eligible energy conservation devices or techniques include:

- (a) Solar thermal equipment;

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(b) Photovoltaic cells and related equipment;

(c) A product or service which increases the energy efficiency of existing equipment, methods of operation or systems which use fossil fuels, and which is on the Energy Conservation Measures list of the Secretary of Energy;

(d) Equipment producing energy from wood, biological waste, grain or other biomass energy sources;

(e) Equipment for cogeneration of energy, district heating or production of energy from industrial waste;

(f) Hydroelectric power equipment;

(g) Wind energy conversion equipment; and

(h) Engineering, architectural, consulting, or other professional services necessary or appropriate for any of the devices or techniques in paragraphs (a) through (g) of this section.

§ 120.332 What are the eligible uses of proceeds?

(a) *Acquire property.* The Borrower may use the loan proceeds to acquire land necessary for imminent plant construction, buildings, machinery, equipment, furniture, fixtures, facilities, supplies, and material needed to accomplish any of the eligible program purposes in § 120.330.

(b) *Research and development.* Up to 30% of loan proceeds may be used for research and development:

(1) Of an existing product or service; or

(2) A new product or service.

(c) *Working capital.* The Borrower may use proceeds for working capital for entering or expanding in the energy conservation market.

§ 120.333 Are there any special credit criteria?

In addition to regular credit evaluation criteria, SBA shall weigh the greater risk associated with energy projects. SBA shall consider such factors as quality of the product or service, technical qualifications of the applicant's management, sales projections, and financial status.

EXPORT WORKING CAPITAL PROGRAM (EWCP)

§ 120.340 What is the Export Working Capital Program?

Under the EWCP, SBA guarantees short-term working capital loans made by participating lenders to exporters (section 7(a)(14) of the Act). Loan maturities may be for up to three years with annual renewals. Proceeds can be used only to finance export transactions. Loans can be for single or multiple export transactions. An export transaction is the production and payment associated with a sale of goods or services to a foreign buyer.

§ 120.341 Who is eligible?

In addition to the eligibility criteria applicable to all 7(a) loans, an applicant must be in business for one full year at the time of application, but not necessarily in the exporting business. SBA may waive this requirement if the applicant has sufficient export trade experience or other managerial experience.

§ 120.342 What are eligible uses of proceeds?

Loan proceeds may be used:

(a) To acquire inventory;

(b) To pay the manufacturing costs of goods for export;

(c) To purchase goods or services for export;

(d) To support standby letters of credit;

(e) For pre-shipment working capital; and

(f) For post-shipment foreign accounts receivable financing.

§ 120.343 Collateral.

A Borrower must give SBA a first security interest sufficient to cover 100 percent of the EWCP loan amount (such as insured accounts receivable or letters of credit). Collateral must be located in the United States, its territories or possessions.

§ 120.344 Unique requirements of the EWCP.

(a) An applicant must submit cash flow projections to support the need for the loan and the ability to repay. After the loan is made, the loan recipient

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must submit continual progress reports.

(b) SBA does not limit the amount of extraordinary servicing fees, as referenced in §120.221(b), under the EWCP.

(c) SBA does not prescribe the interest rates for the EWCP, but will monitor these rates for reasonableness.

INTERNATIONAL TRADE LOANS

§ 120.345 Policy.

Section 7(a)(16) of the Act authorizes SBA to guarantee loans to small businesses that are:

(a) Engaged or preparing to engage in international trade; or

(b) Adversely affected by import competition.

§ 120.346 Eligibility.

(a) An applicant must establish that:

(1) The loan proceeds will significantly expand an existing export market or develop new export markets; or

(2) The applicant business is adversely affected by import competition; and

(3) Upgrading facilities or equipment will improve the applicant's competitive position.

(b) The applicant must have a business plan reasonably supporting its projected export sales.

§ 120.347 Use of proceeds.

The Borrower may use loan proceeds to acquire, construct, renovate, modernize, improve, or expand facilities and equipment to be used in the United States to produce goods or services involved in international trade, and to develop and penetrate foreign markets.

§ 120.348 Amount of guarantee.

SBA can guarantee up to \$1,250,000 for a combination of fixed-asset financing and working capital, supplies and EWCP assistance. The fixed-asset portion of the loan cannot exceed \$1,000,000 and the non-fixed-asset portion cannot exceed \$750,000.

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QUALIFIED EMPLOYEE TRUSTS (ESOP)

§ 120.350 Policy.

Section 7(a)(15) of the Act authorizes SBA to guarantee a loan to a qualified employee trust ("ESOP") to:

(a) Help finance the growth of its employer's small business; or

(b) Purchase ownership or voting control of the employer.

§ 120.351 Definitions.

All terms specific to ESOPs have the same definition for purposes of this section as in the Internal Revenue Service (IRS) Code (title 26 of the United States Code) or regulations (26 CFR chapter I).

§ 120.352 Use of proceeds.

Loan proceeds may be used for two purposes.

(a) *Qualified employer securities.* A qualified employee trust may relend loan proceeds to the employer by purchasing qualified employer securities. The small business concern may use these funds for any general 7(a) purpose.

(b) *Control of employer.* A qualified employee trust may use loan proceeds to purchase a controlling interest (51 percent) in the employer. Ownership and control must vest in the trust by the time the loan is repaid.

§ 120.353 Eligibility.

SBA may assist a qualified employee trust (or equivalent trust) that meets the requirements and conditions for an ESOP prescribed in all applicable IRS, Treasury and Department of Labor (DOL) regulations. In addition, the following conditions apply:

(a) The small business must provide the funds needed by the trust to repay the loan; and

(b) The small business must provide adequate collateral.

§ 120.354 Creditworthiness.

In determining repayment ability, SBA shall not consider the personal assets of the employee-owners of the trust. SBA shall consider the earnings history and projected future earnings of the employer small business. SBA

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may consider the business and management experience of the employee-owners.

VETERANS LOAN PROGRAM

§ 120.360 Which veterans are eligible?

SBA may guarantee or make direct loans to a small business 51 percent owned by one or more of the following eligible veterans:

(a) Vietnam-era veterans who served for a period of more than 180 days between August 5, 1964, and May 7, 1975, and were discharged other than dishonorably;

(b) Disabled veterans of any era with a minimum compensable disability of 30 percent; or

(c) A veteran of any era who was discharged for disability.

§ 120.361 Other conditions of eligibility.

(a) Management and daily operations of the business must be directed by one or more of the veteran owners whose veteran status was used to qualify for the loan.

(b) This direct loan program is available only if private sector financing and guaranteed loans are not available.

(c) A veteran may qualify only once for this program on a direct loan basis.

POLLUTION CONTROL PROGRAM

§ 120.370 Policy.

Section 7(a)(12) of the Act authorizes SBA to guarantee loans up to \$1,000,000 to an eligible small business to plan, design or install a pollution control facility. An applicant must meet the eligibility requirements for 7(a) loans.

LOANS TO PARTICIPANTS IN THE 8(A) PROGRAM

§ 120.375 Policy.

Section 7(a)(20) of the Act authorizes SBA to provide direct (unilaterally or together with Lenders) or guaranteed loans to firms participating in the 8(a) Program.

§ 120.376 Special requirements.

The following special conditions apply (otherwise, 7(a) loan eligibility criteria apply):

(a) The Associate Administrator of Minority Enterprise Development ("MED") may waive the direct loan administrative ceiling of \$150,000, and raise it to \$750,000.

(b) The SBA portion of a guaranteed loan must not exceed \$750,000.

(c) The interest rate on a guaranteed loan shall be the same as on 7(a) guaranteed business loans. The interest rate on a direct loan shall be one percent less than on a regular direct loan.

(d) For a direct loan or SBA's portion of an immediate participation loan, SBA shall subordinate its security interest on all collateral to other debt of the applicant.

§ 120.377 Use of proceeds.

The loan proceeds shall not be used for debt refinancing. Only a manufacturing concern may use loan proceeds for working capital.

DEFENSE ECONOMIC TRANSITION ASSISTANCE

§ 120.380 Program.

Section 7(a)(21) of the Act authorizes SBA to guarantee loans to help eligible small businesses transition from defense to civilian markets, or eligible individuals adversely impacted by base closures or defense cutbacks to acquire or open and operate a small business.

§ 120.381 Eligibility.

(a) *Eligible small businesses.* A small business is eligible if it has been detrimentally impacted by the closure (or substantial reduction) of a Department of Defense installation, or the termination (or substantial reduction) of a Department of Defense Program on which the small business was a prime contractor, subcontractor, or supplier at any tier.

(b) *Eligible individual.* An eligible individual, for purposes of this program, includes the following persons involuntarily separated from their position or voluntarily terminated under a program offering inducements to encourage early retirement:

(1) A member of the Armed Forces of the United States (honorably discharged);

(2) A civilian employee of the Department of Defense; or

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(3) An employee of a prime contractor, sub-contractor, or supplier at any tier of a Department of Defense program.

(c) *Defense loan and technical assistance (DELTA)*. The DELTA program provides financial and technical assistance to defense dependent small businesses which have been adversely affected by defense reductions. The goal of the program is to assist these businesses to diversify into the commercial market while remaining part of the defense industrial base. Complete information on eligibility and other rules is available from each SBA district office.

§ 120.382 Repayment ability.

SBA shall resolve reasonable doubts concerning the small business' proposed business plan for transition to non-defense-related markets in favor of the loan applicant in determining the sound value of the proposed loan.

§ 120.383 Restrictions on loan processing.

Since greater risk may be associated with a loan to an applicant under this program, a Certified Lender or Preferred Lender shall not make a defense economic assistance loan under the PLP or CLP programs.

CAPLINES PROGRAM

§ 120.390 Revolving credit.

(a) CapLines finances eligible small businesses' short-term, revolving and non-revolving working-capital needs. SBA regulations governing the 7(a) loan program govern business loans made under this program. Under CapLines, SBA generally can guarantee up to \$750,000.

(b) CapLines proceeds can be used to finance the cyclical, recurring, or other identifiable short-term operating capital needs of small businesses. Proceeds can be used to create current assets or used to provide financing against the current assets that already exist.

BUILDERS LOAN PROGRAM

§ 120.391 What is the Builders Loan Program?

Under section 7(a)(9) of the Act, SBA may make or guarantee loans to fi-

nance small general contractors to construct or rehabilitate residential or commercial property for resale. This program provides an exception under specified conditions to the general rule against financing investment property. "Construct" and "rehabilitate" mean only work done on-site to the structure, utility connections and landscaping.

§ 120.392 Who may apply?

A construction contractor or homebuilder with a past history of profitable construction or rehabilitation projects of comparable type and size may apply. An applicant may subcontract the work. Subcontracts in excess of \$25,000 may require 100 percent payment and performance bonds.

§ 120.393 Are there special application requirements?

(a) An applicant must submit documentation from:

(1) A mortgage lender indicating that permanent mortgage money is available to qualified purchasers to buy such properties;

(2) A real estate broker indicating that a market exists for the proposed building and that it will be compatible with its neighborhood; and

(3) An architect, appraiser or engineer agreeing to make inspections and certifications to support interim disbursements.

(b) The Borrower may substitute a letter from a qualified Lender for one or more of the letters.

§ 120.394 What are the eligible uses of proceeds?

A Borrower must use the loan proceeds solely to acquire, construct or substantially rehabilitate an individual residential or commercial building for sale. "Substantial" means rehabilitation expenses of more than one-third of the purchase price or fair market value at the time of the application. A Borrower may use up to 20 percent of the proceeds to acquire land, and up to 5 percent for community improvements such as curbs and sidewalks.

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§ 120.395 What is SBA's collateral position?

SBA will require a lien on the building which must be in no less than a second position.

§ 120.396 What is the term of the loan?

The loan must not exceed sixty (60) months plus the estimated time to complete construction or rehabilitation.

§ 120.397 Are there any special restrictions?

The borrower must not use loan proceeds to purchase vacant land for possible future construction or to operate or hold rental property for future rehabilitation. SBA may allow rental of the property only if the rental will improve the ability to sell the property. The sale must be a legitimate change of ownership.

Subpart D—Lenders

§ 120.400 Loan Guarantee Agreements.

SBA may enter into a Loan Guarantee Agreement with a Lender to make deferred participation (guaranteed) loans. Such an agreement does not obligate SBA to participate in any specific proposed loan that a Lender may submit. The existence of a Loan Guarantee Agreement does not limit SBA's rights to deny a specific loan or establish general policies. *See also* §§ 120.441(b) and 120.451(d) concerning Supplemental Guarantee Agreements.

PARTICIPATION CRITERIA

§ 120.410 Requirements for all participating Lenders.

A Lender must:

(a) Have a continuing ability to evaluate, process, close, disburse, service and liquidate small business loans;

(b) Be open to the public for the making of such loans (not be a financing subsidiary, engaged primarily in financing the operations of an affiliate);

(c) Have continuing good character and reputation, and otherwise meet and maintain the ethical requirements of § 120.140

(d) Be supervised and examined by a State or Federal regulatory authority, satisfactory to SBA; and

(e) In order to make Low Documentation loans, be:

(1) A bank or thrift institution which has executed an SBA Form 750, Loan Guaranty Agreement, and which has at least 20 qualified loans outstanding as of the call report date closest to the date of its fiscal year end, or

(2) An institution other than a bank or thrift institution which has executed an SBA Form 750, Loan Guaranty Agreement, and which has at least 20 qualified loans outstanding as of its latest fiscal year end. For purposes of this paragraph (e), a qualified loan is one which was initially approved in the amount of \$100,000 or less and is classified as a commercial, industrial or commercial real estate loan for purposes of call reporting. A lender may request an exception to the requirements of this paragraph (e) from the SBA Associate Administrator for Financial Assistance.

[61 FR 3235, Jan. 31, 1996, as amended at 62 FR 302, Jan. 3, 1997]

§ 120.411 Preferences.

An agreement to participate under the Act may not establish any Preferences in favor of the Lender.

§ 120.412 Other services Lenders may provide Borrowers.

Subject to § 120.140 Lenders, their Associates or the designees of either may provide services to and contract for goods with a Borrower only after full disbursement of the loan to the small business or to an account not controlled by the Lender, its Associate, or the designee. A Lender, an Associate, or a designee providing such services must do so under a written contract with the small business, based on time and hourly charges, and must maintain time and billing records for examination by SBA. Fees cannot exceed those charged by established professional consultants providing similar services. *See also* § 120.195.

§ 120.413 Advertisement of relationship with SBA.

A Lender may refer in its advertising to its participation with SBA. The advertising may not:

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- (a) State or imply that the Lender, or any of its Borrowers, has or will receive preferential treatment from SBA;
- (b) Be false or misleading; or
- (c) Make use of SBA's seal.

MISCELLANEOUS PROVISIONS

§ 120.414 SBA access to Lender files.

A Lender must allow SBA's authorized representatives, during normal business hours, access to its files to review, inspect and copy all records and documents relating to SBA guaranteed loans.

[61 FR 3235, Jan. 31, 1996. Redesignated at 64 FR 6509, Feb. 10, 1999]

§ 120.415 Suspension or revocation of eligibility to participate.

SBA may suspend or revoke the eligibility of a Lender to participate in the 7(a) program because of a violation of SBA regulations, a breach of any agreement with SBA, a change of circumstance resulting in the Lender's inability to meet operational requirements, or a failure to engage in prudent lending practices. Proceedings for such purposes will be conducted in accordance with the provisions of part 134 of this chapter. A suspension or revocation will not invalidate a guarantee previously provided by SBA.

[61 FR 3235, Jan. 31, 1996. Redesignated at 64 FR 6509, Feb. 10, 1999]

PARTICIPATING LENDER FINANCINGS

SOURCE: Sections 120.420 through 120.428 appear at 64 FR 6507-6509, Feb. 10, 1999, unless otherwise noted.

§ 120.420 Definitions.

(a) *7(a) Loans*—All references to 7(a) loans under this subpart include loans made under section 7(a) of the Small Business Act (15 U.S.C. 631 *et seq.*) and loans made under section 502 of the Small Business Investment Act (15 U.S.C. 661 *et seq.*), both of which may be securitized under this subpart.

(b) *Bank Regulatory Agencies*—The bank regulatory agencies are the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision.

(c) *Benchmark Number*—The maximum number of percentage points that a securitizer's Currency Rate can decrease without triggering the PLP suspension provision set forth in § 120.425. SBA will publish the Benchmark Number in the FEDERAL REGISTER.

(d) *Currency Rate*—A securitizer's "Currency Rate" is the dollar balance of its 7(a) guaranteed loans that are less than 30 days past due divided by the dollar balance of its portfolio of 7(a) guaranteed loans outstanding, as calculated quarterly by SBA, excluding loans approved in SBA's current fiscal year.

(e) *Currency Rate Percentage*—The relationship between the securitizer's Currency Rate and the SBA 7(a) loan portfolio Currency Rate as calculated by dividing the securitizer's Currency Rate by the SBA 7(a) loan portfolio Currency Rate.

(f) *Good Standing*—A Lender is in "good standing" with SBA if it:

(1) Is in compliance with all applicable:

- (i) Laws and regulations;
- (ii) Policies; and
- (iii) Procedures;

(2) Is in good financial condition as determined by SBA;

(3) Is not under investigation or indictment for, or has not been convicted of, or had a judgment entered against it for a felony or fraud, or charges relating to a breach of trust or violation of a law or regulation protecting the integrity of business transactions or relationships; and

(4) Does not have any officer or employee who has been under investigation or indictment for, or has been convicted of, or had a judgment entered against him for a felony or fraud, or charges relating to a breach of trust or violation of a law or regulation protecting the integrity of business transactions or relationships unless, the Securitization Committee has determined that good standing exists despite the existence of such person.

(g) *Initial Currency Rate*—The Initial Currency Rate (ICR) is the securitizer's benchmark Currency Rate. SBA will calculate the securitizer's ICR as of the end of the calendar quarter immediately prior to the first securitization

completed after April 12, 1999. This calculation will include all 7(a) loans which are outstanding and were approved in any fiscal year prior to SBA's current fiscal year. Each quarter, SBA will compare each securitizer's Currency Rate to its ICR.

(h) *Initial Currency Rate Percentage*—The Initial Currency Rate Percentage (ICRP) measures the relationship between a securitizer's Initial Currency Rate and the SBA 7(a) loan portfolio Currency Rate at the time of the first securitization after April 12, 1999. The ICRP is calculated by dividing the securitizer's Currency Rate by the SBA 7(a) loan portfolio Currency Rate. SBA will calculate the securitizer's ICRP as of the end of the calendar quarter immediately prior to the first securitization completed after April 12, 1999.

(i) *Loss Rate*—A securitizer's "loss rate," as calculated by SBA, is the aggregate principal amount of the securitizer's 7(a) loans determined uncollectable by SBA for the most recent 10-year period, excluding SBA's current fiscal year activity, divided by the aggregate original principal amount of 7(a) loans disbursed by the securitizer during that period.

(j) *Nondepository Institution*—A "non-depository institution" is a Small Business Lending Company ("SBLC") regulated by SBA or a Business and Industrial Development Company ("BIDCO") or other nondepository institution participating in SBA's 7(a) program.

(k) *Securitization*—A "securitization" is the pooling and sale of the unguaranteed portion of SBA guaranteed loans to a trust, special purpose vehicle, or other mechanism, and the issuance of securities backed by those loans to investors in either a private placement or public offering.

§ 120.421 Which Lenders may securitize?

All SBA participating Lenders may securitize subject to SBA's approval.

§ 120.422 Are all securitizations subject to this subpart?

All securitizations are subject to this subpart. Until additional regulations are promulgated, SBA will consider

securitizations involving multiple Lenders on a case by case basis, using the conditions in § 120.425 as a starting point. SBA will consider securitizations by affiliates as single Lender securitizations for purposes of this subpart.

§ 120.423 Which 7(a) loans may a Lender securitize?

A Lender may only securitize 7(a) loans that will be fully disbursed within 90 days of the securitization's closing date. If the amount of a fully disbursed loan increases after a securitization settles, the Lender must retain the increased amount.

§ 120.424 What are the basic conditions a Lender must meet to securitize?

To securitize, a Lender must:

- (a) Be in good standing as determined by the Associate Administrator for Financial Assistance (AA/FA);
- (b) Use a securitization structure which is satisfactory to SBA;
- (c) Use documents acceptable to SBA, including SBA's model multi-party agreement, as amended from time to time;
- (d) Obtain SBA's written consent, which it may withhold in its sole discretion, prior to executing a commitment to securitize; and
- (e) Cause the original notes to be stored at the FTA, as defined in § 120.600, and other loan documents to be stored with a party approved by SBA.

§ 120.425 What are the minimum elements that SBA will require before consenting to a securitization?

A securitizer must comply with the following three conditions:

- (a) *Capital Requirement*—All securitizers must be considered to be "well capitalized" by their regulator. SBA will consider a depository institution to be in compliance with this section if it meets the definition of "well capitalized" used by its bank regulator. SBA's capital requirement does not change the requirements that banks already meet. For nondepository institutions, SBA, as the regulator, will consider a non-depository institution to be "well capitalized" if it maintains a minimum unencumbered paid

in capital and paid in surplus equal to at least 10 percent of its assets, excluding the guaranteed portion of 7(a) loans. Each nondepository institution must submit annual audited financial statements demonstrating that it has met SBA's capital requirement.

(b) **Subordinated Tranche**—A securitizer or its wholly owned subsidiary must retain a tranche of the securities issued in the securitization (subordinated tranche) equal to the greater of two times the securitizer's Loss Rate or 2 percent of the principal balance outstanding at the time of securitization of the unguaranteed portion of the loans in the securitization. This tranche must be subordinate to all other securities issued in the securitization including other subordinated tranches. The securitizer or its wholly owned subsidiary may not sell, pledge, transfer, assign, sell participations in, or otherwise convey the subordinated tranche during the first 6 years after the closing date of the securitization. The securities evidencing the subordinated tranche must bear a legend stating that the securities may not be sold until 6 years after the issue date. SBA's Securitization Committee may modify the formula for determining the tranche size for a securitizer creating a securitization from a pool of loans located in a region affected by a severe economic downturn if the Securitization Committee concludes that enforcing this section might exacerbate the adverse economic conditions in the region. SBA will work with the securitizer to verify the accuracy of the data used to make the Loss Rate calculation.

(c) **PLP Privilege Suspension.**

(1) *Suspension:* If a securitizer's Currency Rate declines, SBA may suspend the securitizer's PLP unilateral loan approval privileges (PLP approval privileges) if the decline from the securitizer's ICR is more than the Benchmark Number as published in the FEDERAL REGISTER from time to time and the securitizer's Currency Rate Percentage is less than its ICRP. The securitizer will first be placed on probation for one quarter. If, at the end of the probationary quarter the securitizer has not met either of the following conditions in paragraph

(c)(1)(i) or (c)(1)(ii) of this section, SBA will suspend the securitizer's PLP approval privileges and will not approve additional securitization requests from that securitizer. SBA will provide written notice at least 10 days prior to the effective date of suspension. The suspension will last a minimum of 3 months. During the suspension period, the securitizer must use Certified Lender or Regular Procedures to process 7(a) loan applications. The prohibition will end if, at the end of the probationary quarter: (i) the securitizer has improved its Currency Rate to above its ICR less the Benchmark Number; or (ii) its Currency Rate Percentage is either the same or greater than its ICRP.

(2) *Reinstatement:* The suspension will remain in effect until the securitizer meets either the condition in paragraph (c)(1)(i) or (c)(1)(ii) of this section. If the securitizer meets either condition by the end of the 3-month period, notifies SBA with acceptable documentation, and SBA agrees, SBA will reinstate the securitizer. If the securitizer cannot meet either condition, the suspension will remain in effect. The securitizer may then petition the SBA Securitization Committee (Committee) for reinstatement. The Committee will review the reinstatement petition and determine if the securitizer's PLP approval privilege and securitization status should be reinstated. The Committee may consider the economic conditions in the securitizer's market area, the securitizer's efforts to improve its Currency Rate, and the quality of the securitizer's 7(a) loan packages and servicing. The Committee will consider only one petition by a securitizer per quarter.

(3) *The Benchmark Number.* SBA will monitor the Benchmark Number. If economic conditions or policy considerations warrant, SBA may modify the Benchmark Number to protect the safety and soundness of the 7(a) program.

(4) *Data.* SBA will calculate Currency Rate and Currency Rate Percentages quarterly from financial information that securitizers provide. SBA will work with a securitizer to verify the accuracy of the data used to make the Currency Rate calculation.

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§ 120.426 What action will SBA take if a securitizer transfers the subordinated tranche prior to the termination of the holding period?

If a securitizer transfers the subordinated tranche prior to the termination of the holding period, SBA will suspend immediately the securitizer's ability to make new 7(a) loans. The securitizer will have 30 calendar days to submit an explanation to SBA's Securitization Committee ("Committee"). The Committee will have 30 calendar days to review the explanation and determine whether to lift the suspension. If an explanation is not received within 30 calendar days or the explanation is not satisfactory to the Committee, SBA may transfer the servicing of the applicable securitized loans, including the securitizers' servicing fee on the guaranteed and unguaranteed portions and the premium protection fee on the guaranteed portion, to another SBA participating Lender.

§ 120.427 Will SBA approve a securitization application from a capital impaired Securitizer?

If a securitizer does not maintain the level of capital required by this subpart, SBA will not approve a securitization application from that securitizer.

§ 120.428 What happens to a securitizer's other PLP responsibilities if SBA suspends its PLP approval privilege?

The securitizer must continue to service and liquidate loans according to its PLP Supplemental Agreement.

OTHER CONVEYANCES

SOURCE: Sections 120.430 through 120.435 appear at 64 FR 6509, 6510, Feb. 10, 1999, unless otherwise noted.

§ 120.430 What conveyances are covered by §§ 120.430 through 120.435?

Sections 120.430 through 120.435 cover all other transactions in which a Lender sells, sells a participating interest in, or pledges an SBA guaranteed loan other than for the purpose of securitizing and other than conveyances covered under Subpart F, Secondary Market, of this part.

§ 120.431 Which Lenders may sell, sell participations in, or pledge 7(a) loans?

All Lenders may sell, sell participations in, or pledge 7(a) loans in accordance with this subpart.

§ 120.432 Under what circumstances does this subpart permit sales of, or sales of participating interests in, 7(a) loans?

(a) A Lender may sell all of its interest in a 7(a) loan to another Lender operating under a current Loan Guarantee Agreement (SBA Form 750) ("participating Lender"), with SBA's prior written consent, which SBA may withhold in its sole discretion. A Lender may not sell any of its interest in a 7(a) loan to a nonparticipating Lender. The purchasing Lender must take possession of the promissory note and other loan documents, and service the sold 7(a) loan. The purchasing Lender purchases the loan subject to SBA's existing rights including its right to deny liability on its guarantee as provided in § 120.524. After purchase, the purchased loan will be subject to the purchasing Lender's Loan Guarantee Agreement.

(b) A Lender may sell, or sell a participating interest in, a part of a 7(a) loan to another participating Lender. If the Lender retains ownership of a part of the unguaranteed portion of the loan equal to at least 10 percent of the outstanding principal balance of the loan, the Lender must give SBA prior written notice of the transaction, and the Lender must continue to hold the note and service the loan. If a Lender retains ownership of a part of the unguaranteed portion of the loan equal to less than 10 percent of the outstanding principal balance of the loan, the Lender must obtain SBA's prior written consent to the transaction, which consent SBA may withhold in its sole discretion. The Lender must continue to hold the note and other loan documents, and service the loan unless SBA otherwise agrees in its sole discretion.

(c) For purposes of determining the percentage of ownership a Lender has retained, SBA will not consider a Lender to be the owner of the part of a loan

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in which it has sold a participating interest.

§ 120.433 What are SBA's other requirements for sales and sales of participating interests?

SBA requires the following:

(a) The Lender must be in good standing as determined by the AA/FA; and

(b) In transactions requiring SBA's consent, all documentation must be satisfactory to SBA, including, if SBA determines it to be necessary, a multi-party agreement.

§ 120.434 What are SBA's requirements for loan pledges?

(a) Except as set forth in § 120.435, SBA must give its prior written consent to all pledges of any portion of a 7(a) loan, which consent SBA may withhold in its sole discretion;

(b) The Lender must be in good standing as determined by the AA/FA;

(c) All loan documents must be satisfactory to SBA and must include a multi-party agreement among SBA, Lender, the pledgee, FTA and such other parties as SBA determines are necessary;

(d) The Lender must use the proceeds of the loan secured by the 7(a) loans only for financing 7(a) loans and for costs and expenses directly connected with the borrowing for which the loans are pledged;

(e) The Lender must remain the servicer of the loans and retain possession of all loan documents other than the original promissory notes;

(f) The Lender must deposit the original promissory notes at the FTA; and

(g) The Lender must retain an economic interest in and the ultimate risk of loss on the unguaranteed portion of the loans.

§ 120.435 Which loan pledges do not require notice to or consent by SBA?

Notwithstanding the provisions of § 120.434(d), 7(a) loans may be pledged for the following purposes without notice to or consent by SBA:

- (a) Treasury tax and loan accounts;
- (b) The deposit of public funds;
- (c) Uninvested trust funds;
- (d) Discount borrowings at a Federal Reserve Bank; or

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(e) Advances by a Federal Home Loan Bank.

CERTIFIED LENDERS PROGRAM (CLP)

§ 120.440 What is the Certified Lenders Program?

Under the Certified Lenders Program (CLP), designated Lenders process, close, service, and may liquidate, SBA guaranteed loans. SBA gives priority to applications and servicing actions submitted by Lenders under this program, and will provide expedited loan processing or servicing. All other rules in this part 120 relating to the operations of Lenders apply to CLP Lenders.

[61 FR 3235, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996]

§ 120.441 How does a Lender become a CLP Lender?

(a) An SBA field office may nominate a Lender or a Lender may request a field office to consider it for CLP status. SBA district directors may approve and renew a Lender's CLP status. The district director will consider whether the Lender:

(1) Has the ability to process, close, service and liquidate loans;

(2) Has a satisfactory performance history with SBA, including the submission of complete and accurate loan guarantee application packages;

(3) Has an acceptable SBA purchase rate; and

(4) Has shown the ability to work well with the local SBA office.

(b) If the district director does not approve a request for CLP status, the Lender may appeal to the AA/FA, whose decision will be final. If SBA grants CLP status, it applies only in the field office that processed the CLP designation. A CLP Lender must execute a Supplemental Guarantee Agreement that will specify a term not to exceed two years.

§ 120.442 Suspension or revocation of CLP status.

The AA/FA may suspend or revoke CLP status upon written notice providing the reasons at least 10 business days prior to the effective date of the suspension or revocation. Reasons for suspension or revocation may include a

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loan performance record unacceptable to SBA, failure to make the required number of loans under the expedited procedures, or violations of applicable statutes, regulations or published SBA policies and procedures. A CLP Lender may appeal the suspension or revocation made under this section under procedures found in part 134 of this chapter. The action of the AA/FA remains in effect pending resolution of the appeal.

PREFERRED LENDERS PROGRAM (PLP)

§ 120.450 What is the Preferred Lenders Program?

Under the Preferred Lenders Program (PLP), designated Lenders process, close, service, and liquidate SBA guaranteed loans with reduced requirements for documentation to and prior approval by SBA.

§ 120.451 How does a Lender become a PLP Lender?

(a) An SBA field office serving the area in which a Lender's office is located can nominate the Lender, or a Lender can request a field office to consider it for PLP status. The SBA field office will forward its recommendation to an SBA centralized loan processing center which will submit its recommendation and supporting documentation to the AA/FA for final decision.

(b) In making its decision, SBA considers whether the Lender:

- (1) Has the required ability to process, close, service and liquidate loans;
- (2) Has the ability to develop and analyze complete loan packages; and
- (3) Has a satisfactory performance history with SBA.

(c) If the Lender is approved, the AA/FA will designate the area in which it can make PLP loans.

(d) Before it can operate as a PLP Lender, the approved Lender must execute a Supplemental Guarantee Agreement, which will specify a term not to exceed two years.

(e) When a PLP's Supplemental Guarantee Agreement expires, SBA may recertify it as a PLP Lender for an additional term not to exceed two years. Prior to recertification, SBA will review a PLP Lender's loans, poli-

cies and procedures. The recertification decision of the AA/FA is final.

(f) A PLP Lender may request an expansion of the territory in which it can process PLP loans by submitting its request to a loan processing center. The center will obtain the recommendation of each SBA office in the area into which the PLP Lender would like to expand its PLP operations. The center will forward the recommendations to the AA/FA for final decision. If a PLP Lender is not a CLP Lender in a territory into which it seeks to expand its PLP status, it automatically obtains CLP status in that territory when it is granted PLP status for the territory.

§ 120.452 What are the requirements of PLP loan processing?

(a) Subparts A and B of this part govern the making of PLP loans, except for the following:

(1) Certain types of businesses, loans, and loan programs are not eligible for PLP, as detailed in published SBA policy and procedures.

(2) A Lender may not make a PLP business loan which reduces its existing credit exposure for any Borrower, except in cases where an interim loan(s) has been made for other than real estate construction purposes to the Borrower which was approved by the Lender within 90 days of receipt of the issuance for a subsequent PLP loan number.

(3) SBA will not guarantee more than the specified statutory percentage of any PLP loan.

(b) A PLP Lender notifies SBA of its approval of a PLP loan by submitting to SBA's loan processing center appropriate documentation signed by two of the PLP's authorized representatives. SBA will attach the SBA guarantee and notify the PLP Lender of the SBA loan number (if it does not identify a problem with eligibility, and funds are available).

(c) The PLP Lender is responsible for all PLP loan decisions regarding eligibility (including size) and creditworthiness. The PLP Lender is also responsible for confirming that all PLP loan closing decisions are correct, and that it has complied with all requirements of law and SBA regulations.

§ 120.453 What are the requirements of a PLP Lender in servicing and liquidating SBA guaranteed loans?

The PLP Lender must service and liquidate its SBA guaranteed loan portfolio (including its non-PLP loans) using generally accepted commercial banking standards employed by prudent lenders. The PLP Lender must liquidate any defaulted SBA guaranteed loan in its portfolio unless SBA advises in writing that SBA will liquidate the loan. The PLP Lender must submit a liquidation plan to SBA prior to commencing liquidation action. The PLP Lender may take any necessary servicing action, or liquidation action consistent with a plan, for any SBA guaranteed loan in its portfolio, except it may not:

- (a) Take any action that confers a Preference on the Lender; and
- (b) Accept a compromise settlement without prior written SBA consent.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 6510, Feb. 10, 1999]

§ 120.454 PLP performance review.

SBA may review the performance of a PLP Lender. SBA may charge the PLP Lender a fee to cover the costs of this review.

§ 120.455 Suspension or revocation of PLP status.

The AA/FA may suspend or revoke PLP status upon written notice providing the reasons at least 10 business days prior to the effective date of the suspension or revocation. Reasons for suspension or revocation may include loan performance unacceptable to SBA, failure to make the required number of loans under the expedited procedures, or violations of applicable statutes, regulations or published SBA policies and procedures. A PLP Lender may appeal the suspension or revocation made under this section under procedures found in part 134 of this chapter. The action of the AA/FA remains in effect pending resolution of the appeal.

SMALL BUSINESS LENDING COMPANIES
(SBLC)

§ 120.470 What is an SBLC?

A Small Business Lending Company (SBLC) is a nondepository lending in-

stitution licensed by SBA. SBA supervises, examines, and regulates SBLCs. An SBLC is subject to all applicable SBA regulations, including those governing Lenders. SBA has imposed a moratorium on licensing new SBLC's since January, 1982.

(a) An SBLC may only make:

(1) Loans under section 7(a) (except section 7(a)(13)) of the Act in participation with SBA; and/or

(2) SBA guaranteed loans to micro-Lenders in the SBA Microloan program (see subpart G of this part). Such loans are subject to the same conditions as guaranteed loans made to SBA-designated microlenders by SBA participating Lenders.

(b) In addition to complying with §§ 120.400 through 120.413, an SBLC must meet the following requirements:

(1) *Business structure.* It must be a corporation (profit or non-profit).

(2) *Written agreement.* It must sign a written agreement with SBA.

(3) *Capital structure.* It must have unencumbered paid-in capital and paid-in surplus of at least \$1,000,000, or ten percent of the aggregate of its share of all outstanding loans, whichever is more.

(4) *Capital impairment.* It must avoid capital impairment at all times. Impairment exists if the retained earnings deficit of an SBLC exceeds 50 percent of combined paid-in capital and paid-in-surplus, excluding treasury stock. An SBLC must give SBA prompt written notice of any capital impairment within 30 calendar days of the month-end financial report that first reflects the impairment. Until the impairment is cured, an SBLC may not present any loans to SBA for guarantee.

(5) *Issuance of securities.* Without prior written SBA approval, it must not issue any securities (including stock options and debt securities) except stock dividends and common stock issued for cash or direct obligations of, or obligations fully guaranteed as to principal and interest by, the United States.

(6) *Voluntary capital reduction.* Without prior written SBA approval, it must not voluntarily reduce its capital, or purchase and hold more than 2

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percent of any class or combination of classes of its stock.

(7) *Reserves for losses.* It must maintain a reserve in the amount of anticipated losses on loans and receivables.

(8) *Internal control.* It must adopt a plan designed to safeguard its funds and other assets, to assure the reliability of its personnel, and to maintain the accuracy of its financial data.

(9) *Dual control.* It must maintain dual control over disbursement of funds and withdrawal of securities. An SBLC may disburse funds only by checks or wire transfers authorized by signatures of two or more officers covered by the SBLC's fidelity bond, except that checks in an amount of \$1,000 or less may be signed by one bonded officer. There must be two or more bonded officers, or one bonded officer and a bonded employee to open safe deposit boxes or withdraw securities from safekeeping. The SBLC shall furnish to each depository bank, custodian, or entity providing safe deposit boxes a certified copy of the resolution implementing these control procedures.

(10) *Fidelity insurance.* It must maintain a Brokers Blanket Bond, Standard Form 14, or Finance Companies Blanket Bond, Standard Form 15, or such other form of coverage as SBA may approve, in a minimum amount of \$500,000 executed by a surety holding a certificate of authority from the Secretary of the Treasury pursuant to 31 U.S.C. 9304-9308.

(11) *Common control.* It must not control, be controlled by, or be under common control with, another SBLC. Without prior written SBA approval, an Associate of one SBLC shall not be an Associate of another SBLC or of any entity which directly or indirectly controls or is under common control with another SBLC.

(12) *Management.* An SBLC must employ full time professional management.

(13) *Borrowed funds.* Without SBA's prior written approval, it must not be capitalized with borrowed funds. Shareholders owning 10 percent or more of any class of its stock shall not use borrowed funds to purchase the stock unless the net worth of the shareholders is at least twice the amount borrowed or unless the shareholders receive

SBA's prior written approval for a lower ratio.

§ 120.471 Records.

Each SBLC must comply with the following requirements concerning records:

(a) *Maintenance of Records.* It must maintain accurate and current financial records, including books of account, minutes of stockholder, directors, and executive committee meetings, and all documents and supporting materials relating to the SBLC's transactions at its principal business office. Securities held by a custodian pursuant to a written agreement shall be exempt from this requirement.

(b) *Preservation of records.* (1) It must preserve in a manner permitting immediate retrieval the following documentation for the financial statements required by § 120.472 (and of the accompanying certified public accountant's opinion), for the following specified periods:

(i) Preserve permanently:

(A) All general and subsidiary ledgers (or other records) reflecting asset, liability, capital stock and surplus, income, and expense accounts;

(B) All general and special journals (or other records forming the basis for entries in such ledgers); and

(C) The corporate charter, bylaws, application for determination of eligibility to participate with SBA, and all minutes books, capital stock certificates or stubs, stock ledgers, and stock transfer registers;

(ii) Preserve for at least 6 years following final disposition of the related loan:

(A) All applications for financing;

(B) Lending, participation, and escrow agreements;

(C) Financing instruments; and

(D) All other documents and supporting material relating to such loans, including correspondence.

(2) Records and other documents referred to in this section may be preserved electronically if the original is available for retrieval within a reasonable period.

§ 120.472 Reports to SBA.

An SBLC must submit the following to the AA/FA:

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(a) An audited financial statement prepared by a certified public accountant within three months after the close of each fiscal year, and interim financial reports when requested by SBA;

(b) A report of any legal or administrative proceeding, by or against the SBLC, or against an officer, director, or employee of the SBLC for an alleged breach of official duty, within 10 days after initiating or learning of the proceeding, as well as notification of the terms of any settlement or final judgment (in addition to any reporting under applicable SBA Forms);

(c) Copies of any report furnished to its stockholders (including any prospectus, letter, or other publication concerning the financial operations of the SBLC);

(d) A summary of any changes in the SBLC's organization or financing, such as:

(1) Any change in its name, address or telephone number;

(2) Any change in its charter, bylaws, or its officers or directors (to be accompanied by a statement of personal history on an approved SBA form);

(3) Any changes in capitalization (including those identified in § 120.470);

(4) Any changes affecting the eligibility of the SBLC to continue to participate as an SBLC; and

(5) Notice of a pledge of stock within 30 calendar days of the transaction if 10 percent or more of the stock is pledged by any person (or group of persons acting in concert) as collateral for indebtedness, and such pledge does not involve a transfer for which prior written approval of SBA is required under § 120.473;

(e) Such other reports as SBA may require from time to time by written directive.

§ 120.473 Change of ownership or control.

(a) Any change of ownership or control without prior written approval of SBA is prohibited. An SBLC must request approval of any such change from the AA/FA. Pending the approval, the SBLC may not register the proposed new owners on its transfer books nor permit them to participate in any manner in the conduct of the SBLC's af-

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fairs. Change of ownership or control includes:

(1) Any transfer of 10 percent or more of any class of the SBLC's stock, and any agreement providing for such transfer;

(2) Any transfer that could result in the beneficial ownership by any person or group of persons acting in concert of 10 percent or more of any class of its stock, and any agreement providing for such transfer;

(3) Any merger, consolidation, or reorganization; or

(4) Any other transaction or agreement that transfers control of the SBLC.

(b) If transfer of ownership or control is subject to the approval of any State or Federal chartering, licensing, or other regulatory authority, copies of any documents filed with such authority must, at the same time, be transmitted to the AA/FA.

§ 120.474 Prohibited financing.

An SBLC may not make a loan to a small business that has received financing (or a commitment for financing) from an SBIC that is an Associate of the SBLC.

§ 120.475 Audits.

Every SBLC is subject to periodic audits by SBA's Office of Inspector General, Auditing Division, and the cost of such audits will be assessed against the SBLC, except for the first audit. Fees are structured based on the SBLC's assets as of the date of the latest audited financial statement submitted to SBA before the audit. The fee schedule is set forth in SBA's Standard Operating Procedures manual.

§ 120.476 Suspension or revocation.

SBA may revoke or suspend an SBLC for a violation of law, these regulations, or any agreement with SBA. An appeal can be made following the procedures set forth in part 134 of this chapter.

Subpart E—Loan Administration

§ 120.500 General.

This subpart outlines the general loan administration policies applicable to loan servicing and liquidation.

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SERVICING

§ 120.510 Servicing direct and immediate participation loans.

SBA services the direct loans that it makes. Generally, the Lender services immediate participation loans that it makes and in which SBA participates.

§ 120.511 Servicing guaranteed loans.

The Lender services guaranteed loans, holds the Loan Instruments and receives the Borrower's payments of principal and interest.

§ 120.512 Who services the loan after SBA honors its guarantee?

Generally, after SBA honors its guarantee, the Lender must continue to hold the Loan Instruments and service and liquidate the loan. The Lender must execute a Certificate of Interest showing SBA's percentage of the loan, and must submit a liquidation plan to SBA for each loan to be liquidated. If SBA elects to service or liquidate the loan, the Lender must assign the Loan Instruments to SBA.

§ 120.513 What servicing actions require the prior written consent of SBA?

Except as otherwise provided in a Supplemental Guarantee Agreement with the Lender, SBA must give its prior written consent before the Lender takes any of the following actions:

- (a) Alters substantially the terms or conditions of any Loan Instrument (for example, any increase in the principal amount or change in the interest rate, or action conferring a Preference on the Lender);
- (b) Releases collateral having a cumulative value in excess of 20 percent of the original loan amount;
- (c) Accelerates the maturity of the note;
- (d) Sues upon any Loan Instrument;
- (e) Compromises or waives any claim against any Borrower, guarantor, obligor or standby creditor arising out of any Loan Instrument; or
- (f) Increases the amount of any prior lien held by the Lender on the collateral securing the loan.

SBA'S PURCHASE OF A GUARANTEED PORTION

§ 120.520 When does SBA honor its guarantee?

(a) SBA, in its sole discretion, may purchase a guaranteed portion of a loan at any time. A Lender may demand in writing that SBA honor its guarantee if the Borrower is in default on any installment for more than 60 calendar days (or less if SBA agrees) and the default has not been cured. If a Borrower cures a default before a Lender requests purchase by SBA, the Lender's right to request purchase on that default lapses.

(b) Purchase by SBA of the guaranteed portion does not waive any of SBA's rights to recover money paid on the guarantee, based upon the Lender's negligence, misconduct, or violation of this part, including those actions listed in § 120.524(a), the Loan Guarantee Agreement or the Loan Instruments.

§ 120.521 What interest rate applies after SBA purchases its guaranteed portion?

When SBA purchases the guaranteed portion of a fixed interest rate loan, the rate of interest remains as stated in the note. On loans with a fluctuating interest rate, the interest rate that the Borrower owes will be at the rate in effect at the time of the earliest uncured payment default, or the rate in effect at the time of purchase (where no default has occurred).

§ 120.522 How much accrued interest does SBA pay to the Lender or Registered Holder when SBA purchases the guaranteed portion?

(a) *Rate of interest.* If SBA purchases the guaranteed portion from a Lender or from a Registered Holder (if sold in the Secondary Market), it will pay accrued interest at:

- (1) The rate in the note if it is a fixed rate loan; or
- (2) The rate in effect on the date of the earliest uncured payment default, or of SBA's purchase (if there has been no default).

(b) *Payment to Lender.* If the Lender submits a complete purchase request to SBA within 120 days of the earliest uncured payment default, SBA will pay accrued interest to the Lender from

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the last interest paid-to-date up to the date of payment. If the Lender requests SBA to purchase after 120 days from the date of the earliest uncured payment default date, SBA will pay only 120 days of interest. For LowDoc loans, the interest paid to the Lender will be governed by the Supplemental Guarantee Agreement.

(c) *Payment to Registered Holder.* SBA will pay a Registered Holder all accrued interest up to the date of payment.

(d) *Extension of the 120 day period.* Before the 120 days expire, the SBA field office may extend the period if the Lender and SBA agree that the Borrower can cure the default within a reasonable and definite period of time or that the benefits from doing so otherwise will exceed the costs of SBA paying additional interest. If the 120 days have passed, only the AA/FA or designee can extend the period.

§ 120.523 What is the “earliest uncured payment default”?

The earliest uncured payment default is the date of the earliest failure by a Borrower to pay a regular installment of principal and/or interest when due. Payments made by the Borrower before a Lender makes its request to SBA to purchase are applied to the earliest uncured payment default. If the installment is paid in full, the earliest uncured payment default date will advance to the next unpaid installment date. If a Borrower makes any payment after the Lender makes its request to SBA to purchase, the earliest uncured payment default date does not change because the Lender has already exercised its right to request purchase.

§ 120.524 When is SBA released from liability on its guarantee?

(a) SBA is released from liability on a loan guarantee (in whole or in part, within SBA’s exclusive discretion), if any of the events below occur:

(1) The Lender has failed to comply materially with any of the provisions of these regulations, the Loan Guarantee Agreement, or the Authorization;

(2) The Lender has failed to make, close, service, or liquidate a loan in a prudent manner;

(3) The Lender’s improper action or inaction has placed SBA at risk;

(4) The Lender has failed to disclose a material fact to SBA regarding a guaranteed loan in a timely manner;

(5) The Lender has misrepresented a material fact to SBA regarding a guaranteed loan;

(6) SBA has received a written request from the Lender to terminate the guarantee;

(7) The Lender has not paid the guarantee fee within the period required under SBA rules and regulations;

(8) The Lender has failed to request that SBA purchase a guarantee within 120 days after maturity of the loan;

(9) The Lender has failed to use required SBA forms or exact electronic copies; or

(10) The Borrower has paid the loan in full.

(b) If SBA determines, after purchasing its guaranteed portion of a loan, that any of the events set forth in paragraph (a) of this section occurred in connection with that loan, SBA is entitled to recover any money paid on the guarantee plus interest from the Lender responsible for those events.

(c) If the Lender’s loan documentation indicates that one or more of the events in paragraph (a) of this section may have occurred, SBA may undertake such investigation as it deems necessary to determine whether to honor or deny the guarantee, and may withhold a decision on whether to honor the guarantee until the completion of such investigation.

(d) Any information provided to SBA prior to Lender’s request for SBA to honor its guarantee shall not prejudice SBA’s right to deny liability for a guarantee if one or more of the events listed in paragraph (a) of this section occur.

(e) Unless SBA provides written notice to the contrary, the Lender remains responsible for all loan servicing and liquidation actions until SBA honors its guarantee in full.

DEFERMENT, EXTENSION OF MATURITY AND LOAN MORATORIUM

§ 120.530 Deferment of payment.

SBA may agree to defer payments on a business loan for a stated period of

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time, and use such other methods as it considers necessary and appropriate to help in the successful operation of the Borrower. This policy applies to all business loan programs, including 504 loans.

§ 120.531 Extension of maturity.

SBA may agree to extend the maturity of a loan for up to 10 years beyond its original maturity if the extension will aid in the orderly repayment of the loan.

§ 120.532 What is a loan Moratorium?

SBA may assume a Borrower's obligation to repay principal and interest on a loan by agreeing to make the payments to the Lender on behalf of the Borrower under terms and conditions set by SBA. This relief is called a "Moratorium." Complete information concerning this program may be obtained from local SBA offices.

LIQUIDATION OF COLLATERAL

§ 120.540 What are SBA's policies concerning the liquidation of collateral and the sale of business loans?

(a) *Liquidation policy.* SBA or the Lender may liquidate collateral securing a loan if the loan is in default or there is no reasonable prospect that the loan can be repaid within a reasonable period.

(b) *Sale and conversion of loans.* Without the consent of the Borrower, SBA may:

(1) Sell a direct loan;

(2) Convert a guaranteed or immediate participation loan to a direct loan; or

(3) Convert an immediate participation loan to a guaranteed loan or a loan owned solely by the Lender.

(4) Sell direct and purchased 7(a) and 501, 502, 503 and 504 loans in asset sales. SBA will offer these loans for sale to qualified bidders by means of competitive procedures at publicly advertised sales. Bidder qualifications will be set for each sale in accordance with the terms and conditions of each sale.

(c) *Disposal of collateral and assets acquired through foreclosure or conveyance.* SBA or the Lender may sell real and personal property (including contracts and claims) pledged to secure a loan

that is in default in accordance with the provisions of the related security instrument (*see* §120.550 for Homestead Protection for Farmers).

(1) *Competitive bids or negotiated sales.* Generally, SBA will offer loan collateral and acquired assets for public sale through competitive bids at auctions or sealed bid sales. The Lender may use negotiated sales if consistent with its usual practice for similar non-SBA assets.

(2) *Lease of acquired property.* Normally, neither SBA nor a Lender will rent or lease acquired property or grant options to purchase. SBA and the Lender will consider proposals for a lease if it appears a property cannot be sold advantageously and the lease may be terminated on reasonable notice upon receipt of a favorable purchase offer.

(d) *Recoveries and security interests shared.* SBA and the Lender will share pro rata (in accordance with their respective interests in a loan) all loan payments or recoveries, including proceeds from asset sales, all reasonable expenses (including advances for the care, preservation, and maintenance of collateral securing the loan and the payment of senior lienholders), and any security interest or guarantee (excluding SBA's guarantee) which the Lender or SBA may hold or receive in connection with a loan.

(e) *Guarantors.* Guarantors of financial assistance have no rights of contribution against SBA on an SBA guaranteed or direct loan. SBA is not deemed to be a co-guarantor with any other guarantors.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 44110, Aug. 13, 1999]

HOMESTEAD PROTECTION FOR FARMERS

§ 120.550 What is homestead protection for farmers?

SBA may lease to a farmer-Borrower the farm residence occupied by the Borrower and a reasonable amount of adjoining property (no more than 10 acres and seven farm buildings), if they were acquired by SBA as a result of a defaulted farm loan made or guaranteed by SBA (*see* the Consolidated Farm and Rural Development Act, 7

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U.S.C. 1921, for qualifying loan purposes).

§ 120.551 Who is eligible for homestead protection?

SBA must notify the Borrower in possession of the availability of these homestead protection rights within 30 days after SBA acquires the property. A farmer-Borrower must:

- (a) Apply for the homestead occupancy to the SBA field office which serviced the loan within 90 days after SBA acquires the property;
- (b) Provide evidence that the farm produces farm income reasonable for the area and economic conditions;
- (c) Show that at least 60 percent of the Borrower and spouse's gross annual income came from farm or ranch operations in at least any two out of the last six calendar years;
- (d) Have resided on the property during the previous six years; and
- (e) Be personally liable for the debt.

§ 120.552 Lease.

If approved, the applicant must personally occupy the residence during the term of the lease and pay a reasonable rent to SBA. The lease will be for a period of at least 3 years, but no more than 5 years. A lease of less than 5 years may be renewed, but not beyond 5 years from the original lease date. During or at the end of the lease period, the lessee has a right of first refusal to reacquire the homestead property under terms and conditions no less favorable than those offered to any other purchaser.

§ 120.553 Appeal.

If the application is denied, the Borrower may appeal the decision to the AA/FA. Until the conclusion of any appeal, the Borrower may retain possession of the homestead property.

§ 120.554 Conflict of laws.

In the event of a conflict between the homestead provisions at §§120.550 through 120.553 of this part, and any state law relating to the right of a Borrower to designate for separate sale or to redeem part or all of the real property securing a loan foreclosed by the Lender, state law shall prevail.

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Subpart F—Secondary Market

FISCAL AND TRANSFER AGENT (FTA)

§ 120.600 Definitions.

(a) *Certificate* is the document the FTA issues representing a beneficial fractional interest in a Pool (Pool Certificate), or an undivided interest in the entire guaranteed portion of an individual 7(a) guaranteed loan (Individual Certificate).

(b) *Current* means that no repayment from a Borrower to a Lender is over 29 days late measured from the due date of the payment on the records of the FTA's central registry (Pools) or the entity servicing the loan (individual guaranteed portion).

(c) *FTA* is the SBA's fiscal and transfer agent.

(d) *Note Rate* is the interest rate on the Borrower's note.

(e) *Net Rate* is the interest rate on an individual guaranteed portion of a loan in a Pool.

(f) *Pool* is an aggregation of SBA guaranteed portions of loans made by Lenders.

(g) *Pool Assembler* is a financial institution that:

(1) Organizes and packages a Pool by acquiring the SBA guaranteed portions of loans from Lenders;

(2) Resells fractional interests in the Pool to Registered Holders; and

(3) Directs the FTA to issue Certificates.

(h) *Pool Rate* is the interest rate on a Pool Certificate.

(i) *Registered Holder* is the Certificate owner listed in FTA's records.

(j) *SBA's Secondary Market Program Guide* is an issuance from SBA which describes the characteristics of Secondary Market transactions.

§ 120.601 SBA Secondary Market.

The SBA secondary market ("Secondary Market") consists of the sale of Certificates, representing either the entire guaranteed portion of an individual 7(a) guaranteed loan or an undivided interest in a Pool consisting of the SBA guaranteed portions of a number of 7(a) guaranteed loans. By the

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terms of such Certificate, SBA guarantees a Registered Holder timely payment of principal and interest from the loan or loans underlying the Certificate. Transactions involving interests in Pools or the sale of individual guaranteed portions of loans are governed by the contracts entered into by the parties, SBA's Secondary Market Program Guide, and this subpart. See sections 5 (f), (g), and (h) of the Small Business Act (15 U.S.C. 634 (f), (g) and (h)).

CERTIFICATES

§ 120.610 Form and terms of Certificates.

(a) *General form and content.* Each Certificate must be registered with the FTA. SBA must approve the terms of the Certificate.

(b) *Face amount of Pool Certificate.* The face amount of a Pool Certificate cannot be less than a minimum amount as specified in the Program Guide, and the dollar amount of Certificates must be in increments which SBA will specify in the Program Guide (except for one Certificate in each Pool). SBA may change these requirements based upon an analysis of market conditions and program experience, and will publish any such change in the FEDERAL REGISTER.

(c) *Basis of payment for Pool Certificates.* Principal installments and interest payments are based on the unpaid principal balance of the portion of the Pool represented by a Pool Certificate. All prepayments on loans in the Pool must be passed through to the appropriate Registered Holders with the regularly scheduled payments to such Holders.

(d) *Basis of payment for Individual Certificates.* Principal installments and interest payments are based on the unpaid principal balance of the SBA guaranteed portion of the loan supporting an Individual Certificate. The Certificate must provide for a pass through to the Registered Holder of payments which the FTA receives from a Lender or any entity servicing the loan, less applicable fees.

(e) *Interest rate on Pool Certificate.* The interest rate on a Pool Certificate

must be equal to the lowest Net Rate on any individual guaranteed portion of a loan in the Pool.

§ 120.611 Pools backing Pool Certificates.

(a) *Pool characteristics.* As set forth in the Program Guide, each Pool must have:

(1) A minimum number of guaranteed portions of loans;

(2) A minimum aggregate principal balance of the guaranteed portions;

(3) A maximum percentage of the Pool which an individual guaranteed portion may constitute;

(4) A maximum allowable difference between the highest and lowest note interest rates;

(5) A maximum allowable difference between the remaining terms to maturity of the loans in the Pool; and

(6) A minimum weighted average maturity at Pool formation.

(b) *Adjustment of Pool characteristics.* SBA may adjust the Pool characteristics periodically based upon program experience and market conditions.

§ 120.612 Loans eligible to back Certificates.

(a) Pool Certificates are backed by the SBA guaranteed portions of loans comprising the Pool. An Individual Certificate is backed by the SBA guaranteed portion of a single loan. Any such loan must:

(1) Be current as of the date the Pool is formed or the individual guaranteed portion of a loan is initially sold in the Secondary Market;

(2) Be guaranteed under the Act; and

(3) Meet such other standards as SBA may determine to be necessary for the successful operation of the Secondary Market program.

(b) The loans that back a Pool must meet the SBA requirements in effect at the time the Pool is formed.

§ 120.613 Secondary Participation Guarantee Agreement.

When a Lender wants to sell the guaranteed portion of a loan, it enters into a Secondary Participation Guarantee Agreement ("SPGA") with SBA and the prospective purchaser. The terms of sale between the Lender and

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the purchaser cannot require the Lender or SBA to repurchase the guaranteed portion of the loan except in accordance with the terms of the SPGA. Before execution of the SPGA, the Lender must:

- (a) Submit to FTA a copy of the proposed SPGA, the note, and such other documents as SBA may require;
- (b) Disburse to the Borrower the full amount of the loan; and
- (c) Pay SBA all guarantee fees relevant to the loan in full.

THE SBA GUARANTEE OF A CERTIFICATE

§ 120.620 SBA guarantee of a Pool Certificate.

(a) *Extent of Guarantee.* SBA guarantees to a Registered Holder the timely payment of principal and interest installments and any prepayment or other recovery of principal to which the Registered Holder is entitled. If the Borrower of a loan in a Pool backing the Certificates does not make a required installment payment, SBA, through the FTA, will make advances to maintain the schedule of interest and principal payments to the Registered Holders.

(b) *SBA guarantee backed by full faith and credit.* SBA's guarantee of the Pool Certificate is backed by the full faith and credit of the United States.

§ 120.621 SBA guarantee of an Individual Certificate.

(a) *Extent of SBA guarantee.* With respect to Individual Certificates, SBA guarantees to purchase from the Registered Holder the guaranteed portion of the loan for an amount equal to the unpaid principal and accrued interest due as of the date of SBA's purchase, less deductions for applicable fees. Unlike the SBA guarantee with respect to pooled loans, SBA does not guarantee timely payment on Individual Certificates.

(b) *What triggers the SBA guarantee.* SBA's guarantee to the Registered Holder may be called upon when:

- (1) The Borrower remains in uncured default for 60 days on payments of principal or interest due on the note;

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(2) The Lender fails to send to the FTA on a timely basis payments it received from the Borrower; or

(3) The FTA fails to send to the Registered Holder on a timely basis any payments it has received from the Lender.

(c) *Full faith and credit.* SBA's guarantee to the Registered Holder is backed by the full faith and credit of the United States.

POOL ASSEMBLERS

§ 120.630 Qualifications to be a Pool Assembler.

(a) *Application to become Pool Assembler.* The application to become a Pool Assembler is available from the AA/FA. In order to qualify as a Pool Assembler, an entity must send the application to the AA/FA, with an application fee, and certify that it:

(1) Is regulated by the appropriate agency as defined in section 3(a)(34)(G) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(34)(G));

(2) Meets all financial and other applicable requirements of its regulatory authority and the Government Securities Act of 1986, as amended (Pub. L. 99-571, 100 Stat. 3208);

(3) Has the financial capability to assemble acceptable and eligible guaranteed loan portions in sufficient quantity to support the issuance of Pool Certificates; and

(4) Is in good standing with SBA (as the AA/FA determines), the Office of the Comptroller of the Currency ("OCC") if it is a national bank, the Federal Deposit Insurance Corporation if it is a bank not regulated by the OCC, or the National Association of Securities Dealers if it is a member.

(b) *Approval by SBA.* An entity may not submit Pool applications to the FTA until SBA has approved the application to become a Pool Assembler.

(c) *Conduct of business by Pool Assembler.* An entity continues to qualify as a Pool Assembler so long as it:

(1) Meets the eligibility standards in paragraph (a) of this section;

(2) Conducts its business in accordance with SBA regulations and accepted securities or banking industry practices, ethics, and standards; and

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(3) Maintains its books and records in accordance with generally accepted accounting principles or in accordance with the guidelines of the regulatory body governing its activities.

§ 120.631 Suspension or termination of Pool Assembler.

(a) *Suspension or termination.* The AA/FA may suspend a Pool Assembler from operating in the Secondary Market for up to 18 months or terminate its status as a Pool Assembler, if the Pool Assembler (and/or its Associates):

(1) Does not comply with any of the requirements in § 120.630 (a) and (c);

(2) Has been indicted or otherwise formally charged with, or convicted of, a misdemeanor or felony;

(3) Has received an adverse civil judgment that it has committed a breach of trust or a violation of a law or regulation protecting the integrity of business transactions or relationships;

(4) Has not formed a Pool for at least three years; or

(5) Is under investigation by its regulating authority for activities which may affect its fitness to participate in the Secondary Market.

(b) *Suspension procedures.* The AA/FA shall notify a Pool Assembler by certified mail, return receipt requested, of the decision to suspend and the reasons therefore at least 10 business days prior to the effective date of the suspension. The Pool Assembler may appeal the suspension made under this section pursuant to the procedures set forth in part 134 of this chapter. The action of the AA/FA shall remain in effect pending resolution of the appeal.

(c) *Notice of termination.* In order to terminate a Pool Assembler, the AA/FA must issue an order to show cause why the SBA should not terminate the Pool Assembler's participation in the Secondary Market. The Pool Assembler may appeal the termination made under this section pursuant to procedures set forth in part 134 of this chapter. The action of the AA/FA shall remain in effect pending resolution of the appeal.

MISCELLANEOUS PROVISIONS

§ 120.640 Administration of the Pool and Individual Certificates.

(a) *FTA responsibility.* The FTA has the responsibility to administer each Pool or Individual Certificate. It shall maintain a registry of Registered Holders and other information as SBA requires.

(b) *Self-liquidating.* Each Pool or individual guaranteed portion of a loan in the Secondary Market is self-liquidating because of Borrower payments or prepayments, redemption by SBA, and/or payments by SBA or the Lender after default by the Borrower. Substitution of the guaranteed portions of existing loans for defaulted loans is not permitted.

(c) *SBA's right to subrogation.* If SBA pays a claim under a guarantee with respect to a Certificate issued under this subpart, it must be subrogated fully to the rights satisfied by such payment.

(d) *SBA ownership rights not limited.* No Federal, State or local law can preclude or limit the exercise by SBA of its ownership rights in the portions of loans constituting the Pool against which the Certificates are issued.

§ 120.641 Disclosure to purchasers.

(a) *Information to purchaser.* Prior to any sale, the Pool Assembler, Registered Holder of an Individual Certificate, or any subsequent seller must disclose to the purchaser, verbally or in writing, information on the terms, conditions, and yield as described in the SBA Secondary Market Program Guide.

(b) *Information on transfer document.* The seller must provide the same information described in paragraph (a) of this section in writing on the transfer document when the seller submits it to the FTA. After the sale of an Individual Certificate, the FTA will provide the disclosure information in writing to the purchaser.

(c) *Information in prospectus.* If the Registered Holder is a trust, investment Pool, mutual fund or other security, it must disclose the information in paragraph (a) of this section to investors through a prospectus and other promotional material if an Individual Certificate or Pool Certificate is placed

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into or used as the backing for the investment vehicle.

§ 120.642 Requirements before the FTA issues Pool Certificates.

Before the FTA issues any Pool Certificate, the Pool Assembler must deliver to it the following documents:

- (a) A properly completed Pool application form;
- (b) Either:
 - (1) Individual Certificates evidencing the guaranteed portions comprising the Pool; or
 - (2) An executed SPGA and related documentation for the loans whose guaranteed portions are to be part of the Pool; and
- (c) Any other documentation which SBA may require.

§ 120.643 Requirements before the FTA issues Individual Certificates.

(a) *FTA issuance of initial Certificate.* Before the FTA can issue the Individual Certificate for a guaranteed portion of a loan, the original seller must provide the following documents to the FTA:

- (1) An executed SPGA;
 - (2) A copy of the note representing the guaranteed loan; and
 - (3) Any other documentation which SBA may require.
- (b) Review of documentation. SBA may review or require the FTA to review any documentation before the FTA issues a Certificate.

§ 120.644 Transfers of Certificates.

(a) *General rule.* Certificates are transferable. Transfers in the Secondary Market must comply with Article 8 of the Uniform Commercial Code of the State of New York. The seller must use the detached form of assignment (SBA Form 1088), unless the seller and purchaser choose to use another form which the SBA approves. The FTA may refuse to issue a Certificate until it is satisfied that the documents of transfer are complete.

(b) *Transfer on FTA records.* In order for the transfer of a Certificate to be effective the FTA must reflect it on its records.

(c) *Contents of letter of transmittal accompanying the transfer of Certificates.* (1) A letter of transmittal must accom-

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pany each Certificate which a Registered Holder submits to the FTA for transfer. The Registered Holder must supply the following information in the letter:

- (i) Pool number, if applicable;
- (ii) Certificate number;
- (iii) Name of purchaser of Certificate;
- (iv) Address and tax identification number of the purchaser;
- (v) Name and telephone number of the person handling or facilitating the transfer;
- (vi) Instructions for the delivery of the new Certificate.

(2) The Registered Holder must also send the fee which the FTA charges for this service. The FTA will supply fee information to the Registered Holder.

(d) *Lender cannot purchase guaranteed portion of loan it made.* The Lender (or its Associate) that made a 7(a) guaranteed loan cannot purchase the guaranteed portion of that loan in the Secondary Market. If a Lender does purchase the guaranteed portion of one of its own loans, it shall not have the unconditional guarantee of SBA.

§ 120.645 Redemption of Certificates.

(a) *Redemption of Individual Certificate.* The prepayment of the underlying loan or a default on such loan will trigger the redemption of the Certificate by FTA/SBA in accordance with the procedures prescribed in the SPGA.

(b) *Redemption of Pool Certificate.* The FTA and SBA may redeem a Pool Certificate because of prepayment or default of all loans in a Pool.

§ 120.650 Registration duties of FTA in Secondary Market.

The FTA registers all Certificates. This means it issues, transfers title to, and redeems them. All financial transactions relating to a guaranteed portion of a loan flow through the FTA. In fulfilling its obligation to keep the central registry current, the FTA may, with SBA's approval, obtain any necessary information from the parties involved in the Secondary Market.

§ 120.651 Claim to FTA by Registered Holder to replace Certificate.

(a) To replace a Certificate because of loss, theft, destruction, mutilation,

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or defacement, the Registered Holder must:

(1) Give the FTA information about the Certificate and the facts relating to the claim;

(2) File an indemnity bond acceptable to SBA and the FTA with a surety to protect the interests of SBA and the FTA;

(3) Pay the FTA its fee to replace a Certificate; and

(4) Use an affidavit of loss (form available from the FTA) to report:

(i) The name and address of the Registered Holder (and the name and capacity of any representative actually filing the claim);

(ii) The Certificate by Pool number, if applicable;

(iii) The Certificate number;

(iv) The original principal amount;

(v) The name in which the Certificate was registered;

(vi) Any assignment, endorsement or other writing on the Certificate; and

(vii) A statement of the circumstances of the theft or loss.

(b) When the FTA receives notice of the theft or loss, it will stop any transfer of the Certificate. The Registered Holder must send to the FTA all available portions of a mutilated or defaced Certificate. When the Registered Holder completes these steps, the FTA will replace the Certificate.

§ 120.652 FTA fees.

The FTA may charge reasonable servicing fees, transfer fees, and other fees as the SBA and FTA may negotiate under contract.

SUSPENSION OR REVOCATION OF PARTICIPANT IN SECONDARY MARKET

§ 120.660 Suspension or revocation.

(a) *Suspension or revocation of Lender, broker, dealer, or Registered Holder for violation of Secondary Market rules and regulations.* The AA/FA may suspend or revoke the privilege of a Lender, broker, dealer, or Registered Holder to sell, purchase, broker, or deal in loans or Certificates for:

(1) Committing a serious violation, in SBA's discretion, of:

(i) The regulations governing the Secondary Market; or

(ii) Any provisions in the contracts entered into by the parties, including SBA Forms 1085, 1086, 1088 and 1454; or

(2) Knowingly submitting false or fraudulent information to the SBA or FTA.

(b) *Additional rules for suspension or revocation of broker or dealer.* In addition to acting under paragraph (a) of this section, the AA/FA may suspend or revoke the privilege of any broker or dealer to sell or otherwise deal in Certificates in the Secondary Market if:

(1) Its supervisory agency has revoked or suspended the broker or dealer from engaging in the securities business, or is investigating the firm or broker for a practice which SBA considers, in its sole discretion, to be relevant to the broker's or dealer's fitness to participate in the Secondary Market;

(2) The broker or dealer has been indicted or otherwise formally charged with a misdemeanor or felony which bears on its fitness to participate in the Secondary Market; or

(3) A civil judgment is entered holding that the broker or dealer has committed a breach of trust or a violation of any law or regulation protecting the integrity of business transactions or relationships.

(c) *Notice to suspend or revoke.* The AA/FA shall notify the affected party in writing, providing the reasons therefore, at least 10 business days prior to the effective date of the suspension or revocation. The affected party may appeal the suspension or revocation made under this section pursuant to the procedures set forth in part 134 of this chapter. The action of the AA/FA will remain in effect pending resolution of the appeal. Revocation will last a minimum of five years.

Subpart G—Microloan Demonstration Program

§ 120.700 What is the Microloan Program?

The Microloan Demonstration Program assists women, low income individuals, minority entrepreneurs, and other small businesses which need small amounts of financial assistance. Under this program, SBA makes direct and guaranteed loans to Intermediaries

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(as defined below) who use the proceeds to make loans to eligible borrowers. SBA may also make grants under the program to Intermediaries and other qualified nonprofit entities to be used for marketing, management, and technical assistance to the program's target population.

§ 120.701 Definitions.

(a) *Deposit account* is a demand, time, savings, passbook, or similar account maintained with an insured depository institution (not including an account evidenced by a Certificate of Deposit).

(b) *Economically Distressed Area* is a county or equivalent division of local government of a state in which, according to the most recent available data from the United States Bureau of the Census, 40 percent or more of the residents have an annual income that is at or below the poverty level.

(c) *Grant* is a Federal award of money, or property in lieu of money (including cooperative agreements) to an eligible grantee that must account for its use. The term does not include the provision of technical assistance, revenue sharing, loans, loan guarantees, interest subsidies, insurance, direct appropriations, or any fellowship or other lump sum award.

(d) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c).

(e) *Intermediary* is an entity participating in the Microloan Demonstration Program which makes and services Microloans to eligible small businesses and which provides marketing, management, and technical assistance to its borrowers. It may be:

(1) A private, nonprofit community development corporation or other entity;

(2) A consortium of private, nonprofit community development corporations or other entities;

(3) A quasi-governmental economic development entity, other than a state, county, municipal government or any agency thereof; or

(4) An agency of or a nonprofit entity established by a Native American Tribal Government.

(f) *Microloan* is a short-term, fixed interest rate loan of not more than

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\$25,000 made by an Intermediary to an eligible small business.

(g) *Non-Federal sources* are sources of funds other than the Federal Government and may include indirect costs or in-kind contributions paid for under non-Federal programs. Community Block Development Grants are considered non-Federal sources.

(h) *Specialized Intermediary* is an Intermediary which maintains a portfolio of Microloans averaging \$7,500 or less.

§ 120.702 Are there limitations on who can be an Intermediary or on where an Intermediary may operate?

(a) *Prior experience requirement.* To be eligible to be an Intermediary, an organization must:

(1) Have made and serviced short-term fixed rate loans of not more than \$25,000 to newly established or growing small businesses for at least one year; and

(2) Have at least one year of experience providing technical assistance to its borrowers.

(b) *Limitation to one state.* An Intermediary may not operate in more than one state unless the AA/FA determines that it would be in the best interests of the small business community for it to operate across state lines.

§ 120.703 How does an organization apply to become an Intermediary?

(a) *Application Process.* Organizations interested in becoming Intermediaries should contact SBA for information on the application process.

(b) *Documentation in support of application.* The application must include a detailed narrative statement describing:

(1) The types of businesses assisted in the past and those the applicant intends to assist with Microloans;

(2) The average size of the loans made in the past and the average size of intended Microloans;

(3) The extent to which the applicant will make Microloans to small businesses in rural areas;

(4) The geographic area in which the applicant intends to operate, including a description of the economic and demographic conditions existing in the intended area of operations;

(5) The availability and cost of obtaining credit for small businesses in the area;

(6) The applicant's experience and qualifications in providing marketing, management, and technical assistance to small businesses; and

(7) Any plan to use other technical assistance resources (such as counselors from the Service Corps of Retired Executives) to help Microloan borrowers.

§ 120.704 How are applications evaluated?

(a) *Evaluation criteria.* In selecting Intermediaries, SBA will attempt to insure that Microloans are available to small businesses in all industries and particularly to small businesses located in urban and rural areas.

(b) *Preference for organizations which make very small loans.* In selecting Intermediaries, SBA will give priority to applicants which maintain a portfolio of loans averaging \$7,500 or less.

(c) *Consideration of quasi-governmental organizations.* Generally, SBA will consider applications by quasi-governmental organizations only when it determines that program services for a particular geographic area would be best provided by such organization.

§ 120.705 What is a Specialized Intermediary?

At the end of an Intermediary's first year of participation in the program, SBA will determine whether it qualifies as a Specialized Intermediary. An Intermediary qualifies as a Specialized Intermediary if it maintains a portfolio of Microloans averaging \$7,500 or less. Specialized Intermediaries qualify for more favorable interest rates on SBA loans. If, after the first year, an Intermediary qualifies as a Specialized Intermediary, the special interest rate is applied retroactively to SBA loans made to the Intermediary. After the first year SBA will determine an Intermediary's qualifications as a Specialized Intermediary annually, based on its lending practices during the term of its participation in the program. Specialized Intermediaries also qualify for a greater amount of technical assistance grant funding.

§ 120.706 What are the terms and conditions of an Intermediary SBA loan?

(a) *Loan Amount.* An Intermediary may not borrow more than \$750,000 in the first year of participation in the program. In subsequent years, the Intermediary's obligations to SBA may not exceed an aggregate of \$2.5 million, subject to statutory limitations on the total amount of funds available per state.

(b) *Repayment terms.* During the first year of the loan, an Intermediary is not required to make any payments, but interest accrues from the date that SBA disburses the loan proceeds to the Intermediary. After that, SBA will determine the periodic payments. The loan must be repaid within 10 years.

(c) *Interest rate.* The interest rate is equal to the rate applicable to five-year obligations of the United States Treasury, adjusted to the nearest one-eighth percent, less 1.25 percent. However, the interest rate for Specialized Intermediaries is equal to the rate applicable to five-year obligations of the United States Treasury, adjusted to the nearest one-eighth percent, less two percent.

(d) *Collateral.* As security for repayment of the SBA loan, an Intermediary must pledge to SBA a first lien position in the MRF (described below), LLRF (described below), and all notes receivable from Microloans.

(e) *Default.* If for any reason an Intermediary is unable to make payment to SBA when due, SBA may accelerate maturity of the loan and demand payment in full. In this event, or if an Intermediary violates this part or the terms of its loan agreement, it must surrender possession of all collateral described in paragraph (d) of this section to SBA. The Intermediary is not obligated to pay SBA any loss or deficiency which may remain after liquidation of the collateral unless the loss was caused by fraud, negligence, violation of any of the ethical requirements of § 120.140, or violation of any other provision of this part.

(f) *Fees.* SBA does not charge Intermediaries any fees for loans under this Program. An Intermediary may, however, pay minimal closing costs to

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third parties, such as filing and recording fees.

§ 120.707 What conditions apply to loans by Intermediaries to Microloan borrowers?

(a) *General.* An Intermediary may make Microloans to any small business eligible to receive financial assistance under this part. Proceeds from Microloans may be used only for working capital and acquisition of materials, supplies, furniture, fixtures, and equipment. SBA does not review Microloans for creditworthiness.

(b) *Amount and maturity.* Generally, Intermediaries should not make a Microloan of more than \$10,000 to any borrower. An Intermediary may not make a Microloan of more than \$15,000 unless the borrower demonstrates that it is unable to obtain credit elsewhere at comparable interest rates and that it has good prospects for success. An Intermediary may not make a loan of more than \$25,000, and no borrower may owe an Intermediary more than \$25,000 at any one time. Each Microloan must be repaid within six years.

(c) *Interest rate.* The maximum interest rate that can be charged a Microloan borrower is:

(1) On loans of more than \$7,500, the interest rate charged on the SBA loan to the Intermediary, plus 7.75 percentage points; and

(2) On loans of \$7,500 or less, the interest rate charged on the SBA loan to the Intermediary, plus 8.5 percentage points.

§ 120.708 What is the Intermediary's financial contribution?

The Intermediary must contribute from non-Federal sources an amount equal to 15 percent of any loan that it receives from SBA. The contribution may not be borrowed. For purposes of this program, Community Development Block Grants are considered non-Federal sources.

§ 120.709 What is the Microloan Revolving Fund?

The Microloan Revolving Fund ("MRF") is an interest-bearing Deposit Account into which an Intermediary must deposit the proceeds from SBA loans, its contributions from non-Fed-

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eral sources, and payments from its Microloan borrowers. An Intermediary may only withdraw from this account the money needed to establish the Loan Loss Reserve Fund (§ 120.710), proceeds for each Microloan it makes, and any payments to be made to SBA.

§ 120.710 What is the Loan Loss Reserve Fund?

(a) *General.* The Loan Loss Reserve Fund ("LLRF") is an interest-bearing Deposit Account which an Intermediary must establish to pay any shortage in the MRF caused by delinquencies or losses on Microloans. An Intermediary must maintain the LLRF until it has repaid all obligations it owes SBA.

(b) *Level of Loan Loss Reserve Fund in first year.* In an Intermediary's first year, the balance on deposit in the LLRF must equal not less than 15 percent of the total outstanding balance of all notes receivable owed by its Microloan borrowers.

(c) *Level of Loan Loss Reserve Fund in subsequent years.* In all subsequent years, an Intermediary must maintain a balance on deposit in the LLRF at a level which, at a minimum, reflects its loss experience as determined by SBA. However, the maximum amount required in the LLRF will not exceed 15 percent of the total outstanding balance owed by an Intermediary's Microloan borrowers.

§ 120.711 What rules govern Intermediaries?

Intermediaries must operate in accordance with applicable statutes, regulations, policy notices, SBA's Standard Operating Procedures (SOPs), and the information in the application.

§ 120.712 How does an Intermediary get a grant to assist Microloan borrowers?

(a) *General.* An Intermediary is eligible to receive grant funding from SBA of not more than 25 percent of the outstanding balance of all SBA loans to the Intermediary. The Intermediary must contribute, solely from non-Federal sources, an amount equal to 25 percent of the grant. Contributions may be made in cash or in kind.

(b) *Limitations on grant funds.* An Intermediary may not borrow its contribution. It may only use grant funds to provide Microloan borrowers with marketing, management, and technical assistance, except that:

(1) Up to 15 percent of the grant funds may be used to provide information and technical assistance to prospective Microloan borrowers; and

(2) Grant monies may be used to attend training required by SBA. Intermediaries may not enter into third party contracts for the provision of technical assistance to program clients.

(c) *Exception to contribution requirement.* Intermediaries which make at least 50 percent of their loans to small businesses located in or owned by residents of Economically Distressed Areas are not subject to the contribution requirement in paragraph (a) of this section.

(d) *Intermediaries eligible to receive additional grant monies.* An Intermediary may receive an additional SBA grant equal to five percent of the outstanding balance of all loans received from SBA (with no obligation to contribute additional matching funds) if:

(1) The Intermediary makes at least 25 percent of its loans to small businesses located in or owned by residents of an Economically Distressed Area; or

(2) The Intermediary is a Specialized Intermediary.

(e) SBA will determine an Intermediary's eligibility for all grants under this section separately for each loanmaking office or site.

§ 120.713 Does SBA provide technical assistance to Intermediaries?

SBA may procure technical assistance for an Intermediary to improve its knowledge, skill, and understanding of microlending by awarding a grant to a more experienced Intermediary. SBA may also obtain such assistance for prospective Intermediaries in areas of the country that are either not served or underserved by an existing Intermediary.

§ 120.714 How does a non-Intermediary get a grant?

(a) *Grant procedure for non-Intermediaries.* Any nonprofit entity that is not an Intermediary may apply to SBA for a grant to provide marketing, management and technical assistance to low-income individuals for the purpose of assisting them in obtaining private sector financing in amounts of \$25,000 or less. To qualify, it must submit information regarding its ability to provide this assistance. If approved, the grant agreement will establish the terms and conditions for the grant.

(b) *Number and amounts of grants.* In each year of the Microloan Program, SBA may make no more than 25 grants to non-Intermediaries for terms of up to five years. A grant may not exceed \$125,000.

(c) *Contribution by nonprofit entity.* The nonprofit entity must contribute an amount equal to 20 percent of the grant. The contribution from the nonprofit entity must come solely from non-Federal sources, and may include direct costs or in-kind contributions paid for under non-Federal programs.

§ 120.715 Does SBA guarantee any loans an Intermediary obtains from another source?

(a) SBA may guarantee not less than 90 percent of no more than 10 loans by for-profit or nonprofit entities (or an alliance of such entities) to Intermediaries located in urban areas and no more than 10 loans by such entities to Intermediaries located in Rural Areas (as defined in § 120.10).

(b) Any loan guaranteed by SBA under this section will have a term of 10 years. If an Intermediary receives such a loan, it will not need to repay any principal or interest during the first year, although the interest will accrue. During the second through fifth years, the Intermediary will pay interest only. During the sixth through tenth years, it will pay interest and fully amortize the principal.

(c) The interest rate on any loan under this section shall be calculated as described in § 120.706.

**Subpart H—Development
Company Loan Program (504)**

§ 120.800 What is the purpose of the 504 program?

As authorized by Congress, SBA has established this program to foster economic development, create or preserve job opportunities, and stimulate growth, expansion, and modernization of small businesses.

§ 120.801 How is a 504 Project financed?

(a) One or more small businesses may apply for 504 financing through a CDC serving the area where the 504 Project is located. SBA issues an Authorization if it agrees to guarantee part of the funding for a Project.

(b) Usually, a Project requires interim financing from an interim lender (often the same lender that later provides a portion of the permanent financing).

(c) Generally, permanent financing of the Project consists of:

(1) A contribution by the small business in an amount of at least 10 percent of the Project costs;

(2) A loan made with the proceeds of a CDC Debenture for up to 40 percent of the Project costs and certain administrative costs, collateralized by a second lien on the Project Property; and

(3) A *Third Party Loan* comprising the balance of the financing, collateralized by a first lien on the Project property (see § 120.920).

(d) The Debenture is guaranteed 100 percent by SBA (with the full faith and credit of the United States), and sold to Underwriters who form Debenture Pools. Investors purchase interests in Debenture Pools and receive Certificates representing ownership of all or part of a Debenture Pool. SBA and CDCs use various agents to facilitate the sale and service of the Certificates and the orderly flow of funds among the parties.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999]

§ 120.802 Definitions.

The following terms have the same meaning wherever they are used in this

subpart. Defined terms are capitalized wherever they appear.

Area of Operations is a geographic area in which a CDC conducts its activities.

Associate Development Company (ADC) is an entity approved by SBA to assist CDCs to deliver 504 financing.

Central Servicing Agent (CSA) is an entity that receives and disburses funds among the various parties involved in 504 financing under a master servicing agent agreement with SBA.

Certificate is a document issued by SBA or its agent representing ownership of all or part of a Debenture Pool.

Debenture is an obligation issued by a CDC and guaranteed 100 percent by SBA, the proceeds of which are used to fund a 504 loan.

Debenture Pool is an aggregation of Debentures.

Investor is an owner of a beneficial interest in a Debenture Pool.

Job Opportunity is a full time (or equivalent) permanent job created within two years of receipt of 504 funds, or retained in the community because of a 504 loan.

Net Debenture Proceeds are the portion of Debenture proceeds that finance eligible Project costs (excluding administrative costs).

Project is the purchase or lease, and/or improvement or renovation of long-term fixed assets by a small business, with 504 financing, for use in its business operations.

Project Property is one or more long-term fixed assets, such as land, buildings, machinery, and equipment, acquired or improved by a small business, with 504 financing, for use in its business operations.

Third Party Loan is a loan from a commercial or private lender, investor, or Federal (non-SBA), State or local government source that is part of the Project financing.

Underwriter is an entity approved by SBA to form Debenture Pools and arrange for the sale of Certificates.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999]

**CERTIFICATION PROCEDURES TO BECOME
A CDC**

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§ 120.810 Applications for certification as a CDC.

(a) Applicants for certification as a CDC must apply to the SBA District Office serving a proposed Area of Operations. An applicant must demonstrate that it satisfies the certification and operating criteria in §§ 120.820 through 120.829, as well as:

(1) The need for 504 services (if there is already a CDC in the Area of Operations, the applicant must justify the need for another and present a plan to avoid duplication or overlap);

(2) A budget, approved by its Board of Directors; and

(3) A plan to meet CDC operating requirements (without specializing in a particular industry).

(b) The AA/FA, with the recommendation of each District Office in the applicant's proposed Area of Operations, shall make the certification decision.

§ 120.811 Public notice of CDC certification application.

(a) As part of the application process, the applicant must publish a notice in a general circulation newspaper in the proposed Area of Operations, including the name and location of the proposed CDC, its purpose and Area of Operations, and the names and addresses of its officers and directors. The applicant shall send a copy of the notice to SBA. The notice shall provide the public at least 30 days to submit written comments to the District Office. The SBA shall consider the comments in making its decision on the application.

(b) CDCs serving the proposed Area of Operations shall be directly notified and given at least 30 days to comment.

§ 120.812 Probationary period for newly certified CDCs.

(a) Newly certified CDCs will be on probation for a period of two years, at the end of which the CDC must petition for:

(1) Permanent CDC status;

(2) A single, one-year extension of probation; or

(3) ADC status.

(b) SBA will consider failure to file a petition before the end of the probationary period as a withdrawal from the 504 program. If the CDC elects ADC

status or withdrawal, it must transfer all funded and/or approved loans to another CDC, SBA, or another servicer approved by SBA.

REQUIREMENTS FOR CDC CERTIFICATION AND OPERATION

§ 120.820 CDC non-profit status.

A CDC must be a non-profit corporation (or limited liability company) in good standing. (For-profit CDCs certified by SBA prior to January 1, 1987 may retain their certifications.) An SBIC may not become a CDC.

§ 120.821 CDC Area of Operations.

A CDC must have a designated Area of Operations, specified by the CDC and approved by SBA. There can be only one statewide CDC in each state, which must foster economic development throughout the state and provide 504 assistance to areas not adequately served by other CDCs.

§ 120.822 CDC membership.

A CDC must have at least 25 members (or stockholders for for-profit CDCs approved prior to January 1, 1987). No person or entity may own or control more than 10 percent of the CDC's voting membership (or stock). Members must be representative of and provide evidence of active support in the Area of Operations. Members must be from each of the following groups:

(a) Government organizations responsible for economic development in the Area of Operations and acceptable to SBA;

(b) Financial institutions that provide commercial long-term fixed asset financing in the Area of Operations;

(c) Community organizations dedicated to economic development in the Area of Operations such as chambers of commerce, foundations, trade associations, colleges, or universities; and

(d) Businesses in the Area of Operations.

§ 120.823 CDC Board of Directors.

The CDC must have a Board of Directors chosen from the membership by the members, and representing at least three of the four membership groups.

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No single group shall control. The Board members must be responsible officials of the organizations they represent, and at least one must possess commercial lending experience. The Board must meet at least quarterly and shall be responsible for CDC staff decisions and actions. A quorum shall require at least 5 Directors. If there is a vote on loan approval or servicing actions, at least one Board member with commercial loan experience approved by SBA must be present and vote. As an alternative, the Board may obtain the recommendation of another person approved by SBA and possessing commercial lending experience.

§ 120.824 Professional management and staff.

A CDC must have full-time professional management, including an Executive Director (or the equivalent) managing daily operations. It must also have a full-time professional staff qualified by training and experience to market the 504 Program, package and process loan applications, close loans, service the loan portfolio, and sustain a sufficient level of service and activity in the Area of Operations.

(a) *Contracting out to third parties.* CDCs may obtain, under contract, marketing, packaging, processing, and servicing services from qualified Lender Service Providers, as that term is defined in part 103 of this chapter, located in the Area of Operations, subject to SBA's prior written approval. CDCs may contract for outside legal and accounting services without SBA approval. Compensation under all such contracts must be reasonable and customary for similar services in the Area of Operations. SBA may audit the contracts.

(b) *Contracting out to other CDCs.* CDCs may contract with other CDCs for specific services, subject to SBA's prior written approval.

§ 120.825 Financial ability to operate.

A CDC must be able to sustain its operations continuously, with reliable sources of funds (such as income from services rendered and contributions from government or other sponsors).

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§ 120.826 Basic requirements for operating a CDC.

A CDC must operate in accordance with applicable statutes, regulations, policy notices, SBA's SOPs, and the information in its application. It must supply to SBA current and accurate information about all certification and operational requirements, and maintain the records and submit the reports required by SBA.

§ 120.827 Services a CDC provides to small businesses.

(a) A CDC must operate in and adequately service its Area of Operations. It must market the 504 program, package and process 504 loan applications, and close and service 504 loans. A CDC's loan portfolio must be diversified by business sector.

(b) A CDC may provide small businesses with financial and technical assistance, or may help small businesses obtain such assistance from other sources, including preparing, closing, and servicing loans under contract with Lenders in SBA's 7(a) program.

(c) A CDC also may loan amounts to the Borrower equal to the value of all or part of the Borrower's contribution to a Project in the form of cash or land, including site improvements, previously acquired by the CDC.

§ 120.828 Minimum level of CDC lending activity.

A CDC must provide at least two 504 loan approvals each full fiscal year.

§ 120.829 Job Opportunity average a CDC must maintain.

(a) A CDC's portfolio must reflect an average of one Job Opportunity per \$35,000 of 504 loan funding. The AA/FA may permit a CDC to average up to one per \$45,000 for good cause in:

- (1) Alaska;
- (2) Hawaii;
- (3) State-designated urban or rural jobs and enterprise zones;
- (4) Empowerment Zones and Enterprise Communities; and
- (5) Labor Surplus Areas listed in the Department of Labor's publication "Area Trends."

(b) A CDC must indicate in its annual report the Job Opportunities actually

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or estimated to be provided by each Project.

(c) If a CDC does not maintain the required average, it may retain its certification if it justifies to SBA's satisfaction its failure to do so in its annual report and shows how it intends to attain the required average.

§ 120.830 Reports a CDC must submit.

A CDC must submit the following reports to SBA:

(a) An annual report within 90 days after the end of the CDC's fiscal year, and such interim reports as SBA may require;

(b) Resumes for all new Associates and staff;

(c) Reports of involvement in any legal proceeding;

(d) Changes in organizational status;

(e) Changes in any condition that affects its eligibility to continue to participate in the 504 program; and

(f) Quarterly service reports on each loan in its portfolio which is 60 days or more past due (and interim reports upon request by SBA).

EXTENDING A CDC'S AREA OF OPERATIONS

§ 120.835 Application to extend an Area of Operations.

SBA may expand a CDC's Area of Operations if the proposed Area of Operation is not being adequately served by existing CDC(s) and the expanding CDC is well-qualified to serve it. A CDC seeking to expand its Area of Operations must apply in writing to the SBA District Office serving the geographic area in which the CDC proposes to expand.

(a) A CDC may submit an application to expand its Area of Operations if the existing CDCs serving the area have not averaged, over the last two years, at least one loan approval per 100,000 of general population in the Area of Operation. The one loan per 100,000 population requirement applies only to the area proposed for expansion, not the entire Area of Operations of the existing CDC or CDCs serving the expanded area.

Example to paragraph (a) of this section. CDC A averages 0.8 loans per 100,000 of general

population state-wide, but 1.2 loans per 100,000 in city X. CDC B seeks to expand its Area of Operations only into city X. CDC B's application will be denied without further review because CDC A meets the 1 loan per 100,000 population requirement in the proposed expanded Area of Operation.

(b) The application to expand must demonstrate to the satisfaction of SBA the expanding CDC's ability to provide full service to small businesses in the expanded territory, including processing, closing, servicing, and, if authorized, liquidating 504 loans. The expanding CDC must also demonstrate in its application that it will have a local presence and representation in the expanded Area of Operations before submitting any 504 loans for approval.

§ 120.836 Public notice and opportunity for response.

SBA will notify all CDCs servicing the proposed area of expansion, allowing at least 30 days for the existing CDCs to respond to the District Office. The expanding CDC also must publish a notice in a general circulation newspaper in the proposed area of expansion, advising of its intent to expand and giving the public at least 30 days to comment to SBA. The burden of proof in opposing the application will be upon the existing CDC or CDCs to show why SBA should not grant the application for extension.

§ 120.837 SBA decision on application for extension.

(a) The SBA District Office may consider any factor presented to it concerning the proposed area of expansion, the expanding CDC and its Area of Operations, and the existing CDC or CDCs serving the area, including the following: number of loan approvals per 100,000 of general population; number of loan approvals per 100,000 of small businesses; the density of small businesses; jobs created and retained; the number of 504 loan closings; the average 504 loan amount; urban, suburban, or rural character of the expanding area; the mix of small businesses; the prevailing economic conditions; servicing record and capabilities; currency rates; loss rates; other services provided to small businesses (technical and financial assistance); relationship with the local SBA office; and ties to and knowledge

of the local community and its resources.

(b) The SBA District Office will submit a recommendation, with any supporting materials, within 30 days of the end of the comment period to the AA/FA, who will make the final decision within 30 days of his or her receipt of the District Office's recommendation. In making its decision, SBA will consider all information submitted to it, as well as the currency of the expanding CDC's portfolio, including the default rate.

§ 120.838 Expiration of existing, temporary expansions.

All existing, temporary expansions of Areas of Operation shall expire 6 months after March 1, 1996, unless a CDC applies for permanent expansion before the expiration date.

§ 120.839 Case-by-case extensions.

(a) A CDC may apply to make an individual loan for a Project outside its Area of Operations to the District Office serving the area in which the Project will be located if:

(1) The applicant CDC has previously assisted the business to obtain a 504 loan;

(2) The applicant small business or CDC can document in writing to the AA/FA specific circumstances that would prevent the existing CDC or CDCs serving the area from assisting the business adequately; or

(3) The existing CDC or CDCs serving the area agree to permit the applicant CDC to make the loan.

(b) The applicant CDC must demonstrate that it adequately can service the loan.

(c) The AA/FA may approve the request for good cause shown.

[61 FR 3235, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996]

ACCREDITED LENDERS PROGRAM (ALP)

§ 120.840 Accredited Lenders Program.

The SBA may designate a CDC as an Accredited Lender. SBA will provide an Accredited Lender with expedited loan processing or servicing action.

(a) *Applications.* CDCs may apply to the SBA field office with which it is most active. The SBA office will send its recommendation and the application to the AA/FA for final decision.

(b) *Eligibility.* In order to be eligible to receive Accredited Lender status, a CDC must have been an active participant in the 504 loan program for not less than the preceding 12 months. In evaluating an application to be an Accredited Lender, SBA will consider all relevant factors, including:

(1) The CDC's ability to work with the local SBA office;

(2) The quality of past performance; and

(3) The quality of the loan portfolio, including the default rate.

(c) *Term of designation.* CDCs will be designated as ALPs for a two year period, and are eligible to renew the designation for additional two year periods.

(d) *Suspension and revocation.* The AA/FA may suspend or revoke ALP designation upon written notice stating the reasons therefore at least 10 business days prior to the effective date of the suspension or revocation. Reasons for suspension or revocation may include loan performance unacceptable to SBA or violations of applicable statutes, regulations or published SBA policies and procedures. An ALP may appeal the suspension or revocation made under this section pursuant to the procedures set forth in part 134 of this chapter. The action of the AA/FA shall remain in effect pending resolution of the appeal.

PREMIER CERTIFIED LENDERS PROGRAM

§ 120.845 Premier Certified Lenders Program (PCLP).

The SBA has established a pilot program ("Program") to designate a number of CDCs as Premier Certified Lenders ("Premier CDCs"), and to authorize them to approve, close, service, foreclose, litigate, and liquidate 504 loans subject to SBA regulations, procedures, and policies. A Premier CDC's authority to approve loans under the Program is subject to SBA's determination that the loan and Borrower meet SBA's eligibility requirements.

(a) *PCLP Loan Approvals.* A Premier CDC notifies SBA of its approval of a PCLP loan by submitting appropriate documentation to SBA's loan processing center. SBA will notify the Premier CDC of the SBA loan number (if it does not identify a problem with eligibility, and funds are available).

(b) *Premier CDC Exposure.* A Premier CDC must reimburse SBA for 10% of any loss (including attorney's fees and litigation costs and expenses) incurred by SBA as a result of a default by the Premier CDC on a Debenture issued under the PCLP ("Exposure").

(c) *Loss Reserve.* A Premier CDC must establish a loss reserve to provide funds to pay its Exposure to SBA.

(1) *Assets.* (i) A Premier CDC's loss reserve must be composed of any combination of:

(A) Segregated funds on deposit in one or more federally insured depository institutions in which the Premier CDC has granted to SBA, in a manner acceptable to SBA, a first priority perfected security interest to secure the Premier CDC's obligations to SBA under the PCLP; or

(B) Irrevocable letters of credit.

(ii) SBA must be named as the beneficiary of all letters of credit. A Premier CDC's loss reserve deposits in an institution may exceed the institution's insured amount, but only if the institution is "well-capitalized" as defined in regulations of the Federal Deposit Insurance Corporation, as amended (12 CFR 325.103) ("well capitalized bank").

(iii) A loss reserve letter of credit must:

(A) Be issued by a well-capitalized bank;

(B) Have a term equal to or longer than the maturity of the PCLP loan which triggered the requirement for the Premier CDC to contribute to the loss reserve;

(C) Be irrevocable;

(D) Be otherwise acceptable to the SBA;

(E) Have an issuer who remains well-capitalized throughout the term of the letter of credit, or SBA may require an additional loss reserve contribution by the contributing Premier CDC.

(2) *Contributions.* A Premier CDC's loss reserve must total 1 percent of the

Debentures it issues under the PCLP Program. A Premier CDC must contribute 50 percent of the required loss reserve attributable to each PCLP loan when the Debenture it issues to fund the PCLP loan is closed, 25 percent within 1 year after the Debenture is closed, and 25 percent within 2 years after the Debenture is closed.

(3) *Reimbursement.* SBA determines a Premier CDC's Exposure on a loan and withdraws the amount necessary to cover the Exposure. If, after full use of any assets in the loss reserve, there are not enough loss reserve assets to cover a Premier CDC's Exposure, the Premier CDC must pay SBA any difference between the Exposure and the loss reserve assets withdrawn by SBA to cover the Exposure within 45 days of a demand for payment by SBA.

(4) *Replenishment.* If SBA withdraws assets from the loss reserve to cover a Premier CDC's Exposure, the Premier CDC must replace the withdrawn loss reserve assets within 30 days of the withdrawal with contributions equal to or greater than the amount of the assets withdrawn.

(5) *Withdrawal.* A Premier CDC may withdraw loss reserve assets attributable to any repaid Debenture upon written approval by SBA.

(d) *Review.* SBA will review a Premier CDC's PCLP loans annually.

(e) *Suspension and revocation.* The AA/FA may suspend or revoke a CDC's Premier designation upon written notice stating the reasons for the suspension or revocation at least 10 business days prior to the effective date of the suspension or revocation. Reasons for suspension or revocation may include loan performance unacceptable to SBA, failure to meet loss reserve or eligibility criteria, or violations of applicable statutes, regulations, or published SBA policies and procedures. A Premier CDC may appeal the suspension or revocation made under this section pursuant to the procedures set forth in part 134 of this chapter. The action of the AA/FA shall remain in effect pending resolution of the appeal.

(f) *Applications.* A CDC may obtain information concerning this pilot program from the Office of Program Development in the Office of Financial Assistance at SBA's Headquarters. A

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CDC may submit its application to the SBA field office in which it is most active. The SBA field office will send the application with its recommendation to the AA/FA for a final decision.

(g) *Acceptance into Program.* When determining a CDC's application, SBA will consider the CDC's ability to work with the local SBA office and the quality of past performance.

(h) *Program period.* The PCLP pilot program ends on October 1, 2000.

[64 FR 26274, May 14, 1999]

ASSOCIATE DEVELOPMENT COMPANIES (ADCs)

§ 120.850 ADC functions.

(a) An ADC must support local economic development efforts. An ADC may package, close, and service loans for a CDC under a written contract approved by SBA. Such contracts must meet Service Provider criteria, and specify the rights and responsibilities of the parties (including payment terms). The CDC remains solely responsible to SBA for the processing, closing, and servicing of the loan. It may not charge the Borrower a higher fee because it is using the ADC's services.

(b) An ADC must operate in accordance with statutes, regulations, policy notices, SBA's Standard Operating Procedures (SOPs), and the information in its application. It must supply to SBA current and accurate information about all certification and operational requirements, and maintain the records required by SBA.

§ 120.851 ADC eligibility and operating requirements.

(a) An ADC must demonstrate to SBA and maintain the following:

- (1) Adequate management ability;
- (2) A Board of Directors meeting at least quarterly and chosen from the membership by the members;
- (3) A professional staff, including at least one qualified full-time professional with small business lending experience available during regular business hours; and
- (4) A budget or financial statements showing the financial capability and

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funding to sustain continuing operations.

(b) An ADC may contract out for staff services only if SBA gives prior approval. The contract, subject to SBA audit, may not be self-serving, and compensation must be reasonable and customary.

§ 120.852 Suspension and revocation of ADCs.

SBA may require corrective action, or the AA/FA may suspend or revoke ADC status upon written notice stating the reasons therefore at least 10 business days prior to the effective date of the suspension or revocation. Reasons for suspension or revocation may include violations of applicable statutes, regulations or published SBA policies and procedures. An ADC may appeal the suspension or revocation made under this section pursuant to the procedures set forth in part 134 of this chapter. The action of the AA/FA shall remain in effect pending resolution of the appeal.

ETHICAL REQUIREMENTS

§ 120.855 CDC and ADC ethical requirements.

CDCs, ADCs and their Associates must act ethically and exhibit good character. They must meet all of the ethical requirements of §120.140. In addition, they are subject to the following:

(a) Any benefit flowing to an Associate or his or her employer from activities as an Associate must be merely incidental (this requirement does not prevent an Associate or an Associate's employer from engaging in a business relationship with the CDC and/or the Borrower in the regular course of business, including providing interim financing or Third-Party loans); and

(b) Unless waived by SBA for good cause, an Associate may not be an officer, director, or manager of more than one CDC or ADC (except that the membership or Board of Directors of a broader-based CDC may include a member or director of a local CDC within its Area of Operations).

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PROJECT ECONOMIC DEVELOPMENT GOALS

§ 120.860 Required objectives.

A Project must achieve at least one of the economic development objectives set forth in § 120.861 or § 120.862.

§ 120.861 Job creation or retention.

A Project must create or retain one Job Opportunity for every \$35,000 guaranteed by SBA.

§ 120.862 Other economic development objectives.

A Project that achieves any of the following community development or public policy goals is eligible if the CDC's overall portfolio of 504 loans, including the subject loan, meets or exceeds the CDC's required Job Opportunity average. Loan applications must indicate how the Project will meet the specified economic development objective.

(a) Community Development goals:

(1) Improving, diversifying or stabilizing the economy of the locality;

(2) Stimulating other business development;

(3) Bringing new income into the community;

(4) Assisting manufacturing firms (Standard Industrial Classification Manual (SIC) Codes 20-49); or

(5) Assisting businesses in Labor Surplus Areas as defined by the Department of Labor.

(b) Public Policy goals:

(1) Revitalizing a business district of a community with a written revitalization or redevelopment plan;

(2) Expanding exports;

(3) Expanding Minority Enterprise development (See § 124.105(b) for minority groups who qualify for this description);

(4) Aiding rural development;

(5) Increasing productivity and competitiveness (retooling, robotics, modernization, competition with imports);

(6) Modernizing or upgrading facilities to meet health, safety, and environmental requirements; or

(7) Assisting businesses in or moving to areas affected by Federal budget reductions, including base closings, either because of the loss of Federal con-

tracts or the reduction in revenues in the area due to a decreased Federal presence.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999]

LEASING POLICIES SPECIFIC TO 504 LOANS

§ 120.870 Leasing Project Property.

(a) A Borrower may use the proceeds of a 504 loan to acquire, construct, or modify buildings and improvements, and/or to purchase and install machinery and equipment located on land leased to the Borrower by the CDC or an unrelated lessor if:

(1) The remaining term of the lease, including options to renew, exercisable only by the lessee, equals or exceeds the term of the Debenture;

(2) The Borrower assigns its interest in the lease to the CDC with right of reassignment to SBA; and

(3) The 504 loan is secured by a recorded lien against the leasehold estate and other collateral as necessary.

(b) If a CDC leases property to a small business, the rent paid by the small business during the term of the Debenture must be enough to pay principal and interest on all debt incurred by the CDC to finance the Project, and all related expenses. The rent also may include a reasonable return on the CDC's investment.

(c) If the Project is for new construction, the Borrower may lease long term up to 20 percent of the Rentable Property in the Project to one or more tenants if the Borrower immediately occupies at least 60 percent of the Rentable Property, plans to occupy within three years some of the remaining space not immediately occupied and not leased long term, and plans to occupy all of the remaining space not leased long term within ten years.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999]

§ 120.871 Leasing part of an existing building to another business.

(a) The costs of interior finishing of space to be leased out to another business are not eligible Project costs.

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(b) Third-party loan proceeds used to renovate the leased space do not count towards the 504 first mortgage requirement or the Borrower's contribution.

LOAN-MAKING POLICIES SPECIFIC TO 504 LOANS

§ 120.880 Basic eligibility requirements.

In addition to the eligibility requirements specified in subpart A, to be an eligible Borrower for a 504 loan, a small business must:

(a) Use the Project Property (except that an Eligible Passive Company may lease to an Operating Company); and

(b) Together with its affiliates, meet one of the following size standards:

(1) It does not have a tangible net worth in excess of \$6 million, and does not have an average net income after Federal income taxes (excluding any carry-over losses) for the preceding two years in excess of \$2 million; or

(2) It meets the size standards in part 121 of this chapter for the industry in which it is primarily engaged.

§ 120.881 Ineligible Projects for 504 loans.

In addition to the ineligible businesses and uses of proceeds specified in subpart A of this part, the following Projects are ineligible for 504 financing:

(a) Relocation of any of the operations of a small business which will cause a net reduction of one-third or more in the workforce of a relocating small business or a substantial increase in unemployment in any area of the country, unless the CDC can justify the loan because:

(1) The relocation is for key economic reasons and crucial to the continued existence, economic wellbeing, and/or competitiveness of the applicant; and

(2) The economic development benefits to the applicant and the receiving community outweigh the negative impact on the community from which the applicant is moving; and

(b) Projects in foreign countries (loans financing real or personal property located outside the United States or its possessions).

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§ 120.882 Eligible Project costs for 504 loans.

Eligible Project costs which may be paid with the proceeds of 504 loans are:

(a) Costs directly attributable to the Project including expenditures incurred by the Borrower (with its own funds or from a loan):

(1) To acquire land used in the Project prior to applying to SBA for the 504 loan; or

(2) For any other expense toward a Project within nine months prior to receipt by SBA of a complete loan application, unless the time limit is extended or waived by SBA for good cause;

(b) In Projects involving construction, a contingency reserve for cost overruns not to exceed 10 percent of construction cost;

(c) Professional fees directly attributable and essential to the Project, such as title insurance, architecture, engineering, accounting, environmental studies, and legal fees (other than legal fees associated with the closing); and

(d) Repayment of interim financing including points, fees and interest.

§ 120.883 Eligible administrative costs for 504 loans.

The following administrative costs are not part of Project costs, but may be paid with the proceeds of the 504 loan and the Debenture (see § 120.971):

(a) SBA guarantee fee;

(b) Funding fee (to cover the cost of a public issuance of securities and the Trustee);

(c) CDC processing fee;

(d) Borrower's out-of-pocket costs associated with the closing of the 504 loan (other than legal fees);

(e) CDC Closing Fee (see § 120.971(a)(2)) up to a maximum of \$2,500; and

(f) Underwriters' fee.

[64 FR 2118, Jan. 13, 1999]

§ 120.884 Ineligible costs for 504 loans.

Costs not directly attributable and necessary for the Project may not be paid with proceeds of the 504 loan. These include, but are not limited to, the following:

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(a) Debt refinancing (other than interim financing).

(b) Third-Party Loan fees (commitment, broker, finders, origination, processing fees of permanent financing).

(c) Ancillary business expenses, such as:

(1) Working capital;

(2) Counseling or management services fees;

(3) Incorporation/organization costs;

(4) Franchise fees; and

(5) Advertising.

(d) Fixed-asset Project components, such as:

(1) Short-term equipment, furniture, and furnishings (unless essential to and a minor portion of the Project);

(2) Automobiles, trucks, and airplanes; and

(3) Construction equipment (except for heavy duty construction equipment integral to a business' operations and meeting the IRS definition of capital equipment).

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999]

INTERIM FINANCING

§ 120.890 Source of interim financing.

A Project may use interim financing for all Project costs except the Borrower's contribution. Any source (including a CDC) may supply interim financing provided:

(a) The financing is not derived from any SBA program, directly or indirectly;

(b) The terms and conditions of the financing are acceptable to SBA;

(c) The source is not the Borrower or an Associate of the Borrower; and

(d) The source has the experience and qualifications to monitor properly all Project construction and progress payments. (If the source lacks such experience or qualifications, SBA may require the interim loan to be managed by a third party such as a bank or professional construction manager.)

§ 120.891 Certifications of disbursement and completion.

Before the Debenture is issued, the interim lender must certify the amount disbursed. The CDC must cer-

tify that the Project was completed in accordance with the final plans and specifications (except as provided in § 120.961).

§ 120.892 Certifications of no adverse change.

Following completion of the Project, the following certifications must be made before the 504 loan closing:

(a) The interim lender must certify to the CDC that it has no knowledge of any unremedied substantial adverse change in the condition of the small business since the application to the interim lender;

(b) The Borrower (or Operating Company) must certify to the CDC that there has been no unremedied substantial adverse change in its financial condition or its ability to repay the 504 loan since the date of application, and must furnish interim financial statements, current within 90 days of closing; and

(c) The CDC must issue an opinion to the best of its knowledge that there has been no unremedied substantial adverse change in the Borrower's (or Operating Company's) ability to repay the 504 loan since its submission of the loan application to SBA.

PERMANENT FINANCING

§ 120.900 What are the sources of permanent financing?

Permanent financing for each Project must come from three sources: the Borrower's contribution, Third-Party Loans, and the 504 loan. Typically, the Borrower contributes 10 percent of the permanent financing, Third-Party Loans 50 percent and the 504 loan 40 percent.

THE BORROWER'S CONTRIBUTION

§ 120.910 How much must the Borrower contribute?

(a) The Borrower must contribute to the Project cash (or property acceptable to SBA obtained with the cash) or land (that is part of the Project Property), in an amount equal to the following percentage of the Project cost, excluding administrative costs:

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(1) At least 15 percent, if the Borrower (or Operating Company if the Borrower is an Eligible Passive Company) has operated for two years or less;

(2) At least 15 percent, if the Project involves the acquisition, construction, conversion, or expansion of a limited or single purpose building or structure;

(3) At least 20 percent, if the Project involves conditions described in paragraphs (a)(1) and (2) of this section; or

(4) At least 10 percent, in all other circumstances.

(b) The source of the contribution may be a CDC or any other source except an SBA business loan program (see § 120.913 for SBIC exception).

[64 FR 2118, Jan. 13, 1999]

§ 120.911 Land contributions.

The Borrower's contribution may be land (including buildings, structures and other site improvements which will be part of the Project Property) previously acquired by the Borrower or the CDC.

§ 120.912 Borrowed contributions.

The Borrower may borrow its cash contribution from the CDC or a third party. If any of the contribution is borrowed, the interest rate must be reasonable. If the loan is secured by any of the Project assets, the loan must be subordinate to the liens securing the 504 Loan, and the loan may not be repaid at a faster rate than the 504 Loan unless SBA gives prior written approval. A third party lender may not receive voting rights, stock options, or any other actual or potential voting interest in the small business.

§ 120.913 May an SBIC provide the contribution?

Subject to part 107 of this chapter, SBIC's may provide financing for all or part of the Borrower's contribution to the project. SBA shall consider SBIC funds to be derived from federal sources if the SBIC has leverage (as defined in part 107 of this chapter). If the SBIC does not have leverage, the investment will be considered to be from private funds. SBIC financing must be subordinated to the 504 loan and may not be repaid at a faster rate than the Debenture.

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THIRD PARTY LOANS

§ 120.920 Required participation by the Third Party Lender.

(a) *Amount of Third Party Loans.* A Project financing must include one or more Third Party Loans totaling at least as much as the 504 loan. However, the Third Party Loans must total at least 50 percent of the total cost of the Project if:

(1) The Borrower (or Operating Company, if the Borrower is an Eligible Passive Company) has operated for two years or less, or

(2) The Project is for the acquisition, construction, conversion or expansion of a limited or single purpose asset.

(b) *Third Party Loan collateral.* Third Party Loans usually are collateralized by a first lien on the Project property. The SBA cannot guarantee these loans.

[64 FR 2118, Jan. 13, 1999]

§ 120.921 Terms of Third Party loans.

(a) *Maturity.* A Third Party Loan must have a term of at least 7 years when the 504 loan is for a term of 10 years and 10 years when the 504 loan is for 20 years. If there is more than one Third Party Loan, an overall loan maturity must be calculated, taking into account the maturities and amounts of each loan. If there is a balloon payment, it must be justified in the loan report and clearly identified in the Loan Authorization.

(b) *Interest rates.* Interest rates must be reasonable. SBA must establish and publish in the FEDERAL REGISTER a maximum interest rate for any Third Party Loan from commercial financial institutions. The rate shall remain in effect until changed.

(c) *Other terms.* The Third Party Loan must not have any early call feature or contain any demand provisions unless the loan is in default. By participating, a Third Party Loan lender waives, as to the CDC/SBA financing, any provision in its deed of trust, or mortgage, or other documents prohibiting further encumbrances or subordinate debt. In the event of default, the Third Party Lender must give the CDC and SBA written notice of default within 30 days

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of the event of default and at least 60 days prior to foreclosure.

(d) *Future advances.* The Third Party Loan must not be open-ended. After completion of the Project, the Third Party Lender may not make future advances under the Third Party Loan except expenditures to collect amounts due the Third Party Loan notes, maintain collateral and protect the Third Party Lender's lien position on the Third Party Loan.

(e) *Subordination.* The Third Party Lender's lien will be subordinate to the CDC/SBA lien regarding any prepayment penalties, late fees, other default charges, and escalated interest after default due under the Third Party Loan.

(f) *Escalation upon default.* A Third-Party Lender may not escalate the rate of interest upon default to a rate greater than the maximum rate set forth in paragraph (b) of this section. Regarding any Project that SBA approved after September 30, 1996, SBA will only pay the interest rate on the note in effect before the date of the Borrower's default.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999]

§ 120.922 Pre-existing debt on the Project Property.

In addition to its share of Project cost, a Third-Party Loan may include consolidation of existing debt on the Project Property. The consolidation must not improve the lien position of the Lender on the pre-existing debt, unless the debt is a previous Third-Party Loan.

§ 120.923 What are the policies on subordination?

(a) Financing provided by the seller of Project Property must be subordinate to the 504 loan. SBA may waive the subordination requirement if the property is classified as "other real estate owned" by a national bank or other Federally regulated lender and SBA considers the property to be of sufficient value to support the 504 loan.

(b) A Borrower is eligible for a 504 loan even if part of the Project financing is tax-exempt. SBA's lien position must not be subordinate to loans made

from the proceeds of the tax-exempt obligation.

§ 120.924 Prepayment of subordinate financing.

The Borrower must not prepay any Project financing subordinate to the 504 loan without SBA's prior written consent.

§ 120.925 Preferences.

No Third Party Lender shall establish a Preference.

§ 120.926 Referral fee.

The CDC may receive a referral fee from the Third Party Lender if the CDC secured the lender for the Borrower under a written contract. The Borrower cannot pay this fee. If a CDC charges a referral fee, the CDC will be construed as a Referral Agent under part 103 of this chapter.

504 LOANS AND DEBENTURES

§ 120.930 Amount.

(a) Generally, a 504 loan may not exceed 40 percent of total Project cost plus 100 percent of eligible administrative costs. For good cause shown, SBA may authorize an increase in the percentage of Project costs covered up to 50 percent. No more than 50 percent of eligible Project costs can be from Federal sources, whether received directly or indirectly through an intermediary.

(b) Generally, the minimum 504 loan must be \$50,000, although, upon good cause shown, SBA may permit a 504 loan as small as \$25,000. The amount of the Debenture must equal the amount of the 504 Loan plus administrative costs.

(c) Upon completion of the Project, the Debenture amount will be reduced by the amount that the unused contingency reserve exceeds 2 percent of the anticipated Debenture.

§ 120.931 504 lending limits.

The outstanding balance of all SBA financial assistance to a Borrower and its affiliates under the 504 program covered by this part must not exceed \$750,000 (\$1,000,000 if one or more of the

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public policy goals enumerated in § 120.862(b) applies to the Project).

§ 120.932 Interest rate.

The interest rate of the 504 Loan and the Debenture which funds it is set by the SBA and approved by the Secretary of the Treasury.

§ 120.933 Maturity.

The term of a 504 Loan and the Debenture which funds it shall be either 10 or 20 years.

§ 120.934 Collateral.

The CDC/SBA takes a junior lien position (usually a second lien) on the Project collateral. In rare circumstances, collateral other than the Project collateral may be accepted by SBA. Sometimes secondary collateral is required. All collateral must be insured against such hazards and risks as SBA may require, with provisions for notice to SBA and the CDC in the event of impending lapse of coverage.

§ 120.935 Deposit.

At the time of application for a 504 loan, the CDC may require a deposit from the Borrower of \$2,500 or 1 percent of the Net Debenture Proceeds, whichever is less. The deposit may be applied to the loan processing fee if the application is accepted, but must be refunded if the application is denied. If the small business withdraws its application, the CDC may deduct from the deposit reasonable costs incurred in packaging and processing the application.

§ 120.936 Subordination to CDC.

SBA, in its sole discretion, may permit subordination of the Debenture to any other obligation of the CDC, except debt incurred by the CDC to obtain funds to loan to the Borrower for the Borrower's required contribution to the Project financing.

§ 120.937 Assumption.

A 504 loan may be assumed with SBA's prior written approval.

§ 120.938 Default.

(a) Upon occurrence of an event of default specified in the 504 note which re-

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quires automatic acceleration, the note becomes due and payable. Upon occurrence of an event of default which does not require automatic acceleration, SBA may forbear acceleration of the note and attempt to resolve the default. If the default is not cured subsequently, the note shall be accelerated. In either case, upon acceleration of the note, the Debenture which funded it is also due immediately, and SBA must honor its guarantee of the Debenture. SBA shall not reimburse the investor for any premium paid.

(b) If a CDC defaults on a Debenture, SBA generally shall limit its recovery to the payments made by the small business to the CDC on the loan made from the Debenture proceeds, and the collateral securing the defaulted loan. However, SBA will look to the CDC for the entire amount of the Debenture in the case of fraud, negligence, or misrepresentation by the CDC.

§ 120.939 Borrower prohibition.

Neither a Borrower nor an Associate of the Borrower may purchase an interest in a Debenture Pool in which the Debenture that funded its 504 loan has been placed.

§ 120.940 Prepayment of the 504 loan or Debenture.

The Borrower may prepay its 504 loan, if it pays the entire principal balance, unpaid interest, any unpaid fees, and any prepayment premium established in the note. If the Borrower prepays, the CDC must prepay the corresponding Debenture with interest and premium. If one of the Debentures in a Debenture Pool is prepaid, the Investors in that Debenture Pool must be paid pro rata, and SBA's guarantee on the entire Debenture Pool must be proportionately reduced. If the entire Debenture Pool is paid off, SBA may call all Certificates backed by the Pool for redemption.

§ 120.941 Certificates.

(a) The face value of a Certificate must be at least \$25,000. Certificates are issued in registered form and transferred only by entry on the central registry maintained by the Trustee. SBA guarantees the timely payment of principal and interest on the Certificates.

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(b) Before the sale of a Certificate, the seller, or the broker or dealer acting as the seller's agent, must disclose to the purchaser the terms, conditions, yield, and premium and other characteristics not guaranteed by SBA.

DEBENTURE SALES AND SERVICE AGENTS

§ 120.950 SBA and CDC must appoint agents.

SBA and the CDC must appoint the following agents to facilitate the sale and service of the Certificates and disbursement of the proceeds.

§ 120.951 Selling agent.

The CDC, with SBA approval, shall appoint a Selling Agent to select underwriters, negotiate the terms and conditions of Debenture offerings with the underwriters, and direct and coordinate Debenture sales.

§ 120.952 Fiscal agent.

SBA shall appoint a Fiscal Agent to assess the financial markets, minimize the cost of sales, arrange for the production of the Offering Circular, Debenture Certificates, and other required documents, and monitor the performance of the Trustee and the underwriters.

§ 120.953 Trustee.

SBA must appoint a Trustee to:

- (a) Issue Certificates;
- (b) Transfer the Certificates upon resale in the secondary market;
- (c) Maintain physical possession of the Debentures for SBA and the Certificate holders;
- (d) Establish and maintain a central registry of:
 - (1) Debenture Pools, including the CDC obligors and the interest rate payable on the Debentures in each Pool;
 - (2) Certificates issued or transferred, including the Debenture Pool backing the Certificate, name and address of the purchaser, price paid, the interest rate on the Certificate, and fees or charges assessed by the transferor; and
 - (3) Brokers and dealers in Certificates, and the commissions, fees or discounts granted to the brokers and dealers;

(e) Receive semi-annual Debenture payments and prepayments;

(f) Make regularly scheduled and prepayment payments to Investors; and

(g) Assure before any resale of a Debenture or Certificate is recorded in the registry that the seller has provided the purchaser a written disclosure statement approved by SBA.

§ 120.954 Central Servicing Agent.

(a) SBA has entered into a Master Servicing Agreement designating a Central Servicing Agent (CSA) to support the orderly flow of funds among Borrowers, CDCs, and SBA. The CDC and Borrower must enter into an individual Servicing Agent Agreement with the CSA for each 504 loan, constituting acceptance by the CDC and the Borrower of the terms of the Master Servicing Agreement.

(b) The CSA has established a master reserve account. All funds related to the 504 loans and Debentures flow through the master reserve account under the provisions of the Master Servicing Agreement. The master reserve account will be funded by a guarantee fee, a funding fee to be published from time to time in the FEDERAL REGISTER, and by principal and interest payments of 504 loans. At SBA's direction, the CSA may use funds in the master reserve account to defray program expenses. In the event a Borrower defaults and its 504 note is accelerated, SBA shall add funds under its guarantee to ensure the full and timely payment of the Debenture which funded the 504 loan. At SBA's direction, the CSA must pay to the CDC servicing each loan the interest accruing in the master reserve account on loan payments made by each Borrower between the date of receipt of each monthly payment and the date of disbursement to investors. The CSA may disburse such interest periodically to CDCs on a pro rata basis. SBA may use interest accruals in the master reserve account earned prior to October 1991 (not previously distributed to the CDCs) for the costs of 504 program administration.

§ 120.955 Agent bonds and records.

(a) Each agent (in §§120.951 through 120.954) must provide a fidelity bond or insurance in such amount as necessary

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to fully protect the interest of the government.

(b) SBA must have access at the agent's place of business to all books, records and other documents relating to Debenture activities.

§ 120.956 Suspension or revocation of brokers and dealers.

The AA/FA may suspend or revoke the privilege of any broker or dealer to participate in the sale or marketing of Debentures and Certificates for actions or conduct bearing negatively on the broker's fitness to participate in the securities market. SBA must give the broker or dealer written notice, stating the reasons therefore, at least 10 business days prior to the effective date of the suspension or revocation. A broker or dealer may appeal the suspension or revocation made under this section pursuant to the procedures set forth in part 134 of this chapter. The action of the AA/FA will remain in effect pending resolution of the appeal. SBA may suspend or revoke the opportunity for a hearing under part 134 of this chapter.

CLOSINGS

§ 120.960 Responsibility for closing.

The CDC is responsible for the 504 Loan closing. The Debenture closing is the joint responsibility of the CDC and SBA.

§ 120.961 Construction escrow accounts.

The CSA, title company, CDC attorney, or bank may hold Debenture proceeds in escrow to complete Project components such as landscaping and parking lots, and acquire machinery and equipment if the component or acquisition is a minor portion of the total Project and has been contracted for completion or delivery at a specified price and specific future date. The escrow agent must disburse funds upon approval by the CDC and the SBA, supported by invoices and payable jointly to the small business and the designated contractor.

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SERVICING AND FEES

§ 120.970 Servicing of 504 loans and Debentures.

The CDC must service the 504 loan in accordance with the Loan Authorization, these regulations, SBA policies and procedures, and prudent lending standards until paid in full, including review of the small business's financial statements, tax filings, insurance, and security filings. In doing so, CDCs must comply with the provisions of § 120.513. In addition, CDCs must comply with the servicing requirements set forth in SBA's SOP. CDCs must report promptly to SBA any adverse trend, condition or information relevant to a Borrower. Upon request by a CDC, SBA may agree to defer a Borrower's monthly payment. SBA may negotiate agreements with CDCs to liquidate loans.

§ 120.971 Allowable fees paid by Borrower.

(a) *CDC fees.* CDCs may charge the following fees to the Borrower:

(1) *Processing fee.* The CDC may charge up to 1.5 percent of the net Debenture proceeds to process the financing. Two-thirds of this fee will be considered earned and may be collected by the CDC when the Authorization for the Debenture is issued by SBA. The portion of the processing fee paid by the Borrower may be reimbursed from the Debenture proceeds;

(2) *Closing fee.* The CDC may charge a reasonable closing fee sufficient to reimburse it for the expenses of its in-house or outside legal counsel, and other miscellaneous closing costs (CDC Closing Fee). Closing costs, other than legal fees, may be funded out of the Debenture proceeds;

(3) *Servicing fee.* The CDC will charge a monthly servicing fee of at least 0.625 percent per annum and no more than 2 percent per annum on the unpaid balance of the loan as determined at five-year anniversary intervals. A servicing fee greater than 1.5 percent in a rural area and 1 percent everywhere else requires SBA's prior written approval, based on evidence of substantial need. The servicing fee may be paid only from loan payments received. The fees may be accrued without interest and

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collected from the CSA when the payments are made.

(4) *Late fees.* Loan payments received after the 15th of each month may be subject to a late payment fee of 5 percent of the late payment or \$100, whichever is greater. These fees will be collected by the CSA on behalf of the CDC; and

(5) *Assumption fee.* Upon SBA's written approval, a CDC may charge an assumption fee not to exceed 1 percent of the outstanding principal balance of the loan being assumed.

(b) *CSA fees.* The CSA may charge an initiation fee on each loan and a monthly servicing fee under the terms of the Master Servicing Agreement.

(c) *Other agent fees.* Agent fees and charges necessary to market and service Debentures and Certificates may be assessed to the Borrower or the investor. The fees must be approved by SBA and published periodically in the FEDERAL REGISTER.

(d) *SBA fees.* (1) SBA charges a 0.5 percent guarantee fee on the Debenture.

(2) For loans approved by SBA after September 30, 1996, SBA charges a fee of not more than 0.9375 percent annually on the unpaid principal balance of the loan as determined at five-year anniversary intervals.

(e) *Miscellaneous fees.* A funding fee not to exceed 0.25 percent of the Debenture may be charged to cover costs incurred by the trustee, fiscal agent, transfer agent.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2119, Jan. 13, 1999]

§ 120.972 Third Party Lender participation fee and Development Company fee.

(a) *Participation fee.* For loans approved by SBA after September 30, 1996, SBA must collect a one-time fee from the Third Party Lender equal to 50 basis points on its total participation in a Project when the Third Party Lender occupies a senior credit position to SBA in the project.

(b) *Development company fee.* For loans approved by SBA after September 30, 1996, SBA must collect an annual fee from the CDC equal to 0.125 percent of the outstanding principal balance of the debenture. The fee must

be paid from the servicing fees collected by the CDC and cannot be paid from any additional fees imposed on the Borrowers.

[64 FR 2119, Jan. 13, 1999]

§ 120.973 Oversight and evaluation of CDCs and ADCs.

SBA may conduct an operational review of a CDC or ADC. The SBA Office of Inspector General may conduct, supervise or coordinate audits pursuant to the Inspector General Act. The CDC or ADC must cooperate and make its staff, records, and facilities available.

[61 FR 3235, Jan. 31, 1996. Redesignated at 64 FR 2119, Jan. 13, 1999]

CDC TRANSFER, SUSPENSION AND REVOCATION

§ 120.980 Transfer of CDC to ADC status.

SBA shall transfer to ADC status any CDC that fails to meet the activity level required by SBA, on average over two consecutive fiscal years. SBA shall notify the CDC in writing of the action and of the opportunity for a hearing pursuant to part 134 of this chapter at least 10 business days prior to the transfer. During the pendency of a hearing, SBA's action will remain in effect.

§ 120.981 Voluntary transfer and surrender of CDC certification.

A CDC may not transfer its certification or withdraw from the 504 program without SBA's consent. The CDC must provide a plan to SBA to transfer its portfolio. The portfolio may only be transferred with SBA's written consent. If a CDC desires to withdraw from the 504 program, it must forfeit its portfolio to SBA. SBA may conduct an audit of the transferring or withdrawing CDC.

§ 120.982 Correcting CDC servicing deficiencies.

SBA may require corrective action, including the transfer of existing or pending financings to another CDC in good standing. SBA must notify the CDC in writing of any servicing, reporting or collection deficiencies and

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the corrective actions to be taken. SBA may instruct the CSA to withhold service and late fees and may assess the CDC up to \$250 per day for expenses incurred by SBA to correct the deficiencies. If non-compliance continues for 90 days, SBA may take the fees as compensation for its efforts to obtain compliance.

§ 120.983 Transfer of CDC servicing to SBA or another CDC.

If a CDC fails to correct servicing deficiencies, or is unable or unwilling to service its portfolio, SBA may assume the servicing or require the transfer of all or part of the CDC's portfolio to another CDC within or adjoining the deficient CDC's Area of Operations. If there is no suitable CDC, SBA may approve a transfer to another entity. Future service fees from transferred loans will be paid to the transferee. In addition, the CDC's processing authority will be temporarily suspended.

§ 120.984 Suspension or revocation of CDC certification.

(a) *Suspend or revoke.* The AA/FA may suspend or revoke the CDC's certification if a CDC:

- (1) Violates a statute, an SBA regulation, or the terms of a Debenture, authorization, or agreement with SBA;
- (2) Makes a material false statement, knowingly misrepresents, or fails to state a material fact;
- (3) Fails to maintain good character;
- (4) Fails to operate according to prudent lending standards;
- (5) Fails to correct servicing, collection, reporting, or other deficiencies; or
- (6) Is unable or unwilling to operate in accordance with the requirements of this part.

(b) *Transfer portfolio.* Upon suspension or revocation, the CDC must transfer its remaining portfolio and any 504 applications or financings in process to another CDC designated or approved by SBA. If a pending 504 financing is completed after a transfer, any deposit must also be transferred. Any fees must be apportioned by SBA between the two CDCs in proportion to services performed.

(c) *Provide written notice.* SBA must give written notice to the CDC at least

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10 business days prior to the effective date of a suspension or revocation, informing the CDC of the opportunity for a hearing pursuant to part 134 of this chapter.

ENFORCEABILITY OF 501, 502 AND 503 LOANS AND OTHER LAWS

§ 120.990 501, 502 and 503 loans.

SBA has discontinued loan programs for 501, 502, and 503 loans. Outstanding loans remain under these programs, and Borrowers, CDCs, and SBA must comply with the terms and conditions of the corresponding notes and Debentures, and the regulations in this part in effect when the obligations were undertaken or last in effect, if applicable.

§ 120.991 Effect of other laws.

No State or local law may preclude or limit SBA's exercise of its rights with respect to notes, guarantees, Debentures and Debenture Pools, or of its enforcement rights to foreclose on collateral.

PART 121—SMALL BUSINESS SIZE REGULATIONS

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SOURCE: 61 FR 3286, Jan. 31, 1996, unless otherwise noted.

Subpart A—Size Eligibility Provisions and Standards

PROVISIONS OF GENERAL APPLICABILITY

§ 121.101 What are SBA size standards?

SBA's size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for "small business" concerns. Size standards have been established for types of economic activity, or industry, generally under the Standard Industrial Classification (SIC) System. The SIC System is described in the "Standard Industrial Classification Manual" published by the Office of Management and Budget, Executive Office of the President, and sold by the U.S. Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. The SIC System assigns four-digit SIC codes to all economic activity within ten major divisions. Section 121.201 describes the size standards now established. A full table matching a size standard with each four-digit SIC code is also published annually by SBA in the FEDERAL REGISTER.

§ 121.102 How does SBA establish size standards?

(a) SBA considers economic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size. It also considers technological changes, competition from other industries, growth trends, historical activity within an industry, unique factors occurring in the industry which may distinguish small firms from other firms, and the objectives of its programs and the impact on those programs of different size standard levels.

(b) As part of its review of a size standard, SBA will investigate if any concern at or below a particular standard would be dominant in the industry.

SBA will take into consideration market share of a concern and other appropriate factors which may allow a concern to exercise a major controlling influence on a national basis in which a number of business concerns are engaged. Size standards seek to ensure that a concern that meets a specific size standard is not dominant in its field of operation.

(c) Please address any requests to change existing size standards or establish new ones for emerging industries to the Assistant Administrator for Size Standards, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

§ 121.103 What is affiliation?

(a) *General Principles of Affiliation.* (1) Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.

(2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

(3) Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, may be treated as one party with such interests aggregated.

(4) SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size.

(b) *Exclusion from affiliation coverage.*

(1) Business concerns owned in whole or substantial part by investment companies licensed, or development companies qualifying, under the Small Business Investment Act of 1958, as amended, are not considered affiliates of such investment companies or development companies.

(2) Business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601),

Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

(3) Business concerns which are part of an SBA approved pool of concerns for a joint program of research and development as authorized by the Small Business Act are not affiliates of one another because of the pool.

(4) Business concerns which lease employees from concerns primarily engaged in leasing employees to other businesses are not affiliated with the leasing company solely on the basis of a leasing agreement.

(5) For financial, management or technical assistance under the Small Business Investment Act of 1958, as amended, (an applicant is not affiliated with the investors listed in paragraphs (b)(5) (i) through (vi) of this section.

(i) Venture capital operating companies, as defined in the U.S. Department of Labor regulations found at 29 CFR 2510.3-101(d);

(ii) Employee benefit or pension plans established and maintained by the Federal government or any state, or their political subdivisions, or any agency or instrumentality thereof, for the benefit of employees;

(iii) Employee benefit or pension plans within the meaning of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1001, *et seq.*);

(iv) Charitable trusts, foundations, endowments, or similar organizations exempt from Federal income taxation under section 501(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. 501(c));

(v) Investment companies registered under the Investment Company Act of 1940, as amended (1940 Act) (15 U.S.C. 80a-1, *et seq.*); and

(vi) Investment companies, as defined under the 1940 Act, which are not registered under the 1940 Act because they are beneficially owned by less than 100 persons, if the company's sales literature or organizational documents indicate that its principal purpose is investment in securities rather than

the operation of commercial enterprises.

(6) A protege firm is not an affiliate of a mentor firm solely because the protege firm receives assistance from the mentor firm under Federal Mentor-Protege programs.

(c) *Affiliation based on stock ownership.* (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock.

(2) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

(d) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Since stock options, convertible debentures, and agreements to merge (including agreements in principle) affect the power to control a concern, SBA treats them as though the rights granted have been exercised (except that an affiliate cannot use them to appear to terminate control over another concern before it actually does so). SBA gives present effect to an agreement to merge or sell stock whether such agreement is unconditional, conditional, or finalized but unexecuted. Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agreements in principle" and, thus, are not given present effect.

(e) *Affiliation based on common management.* Affiliation arises where one or more officers, directors or general partners controls the board of directors and/or the management of another concern.

(f) *Affiliation based on joint venture arrangements.* (1) Parties to a joint venture are affiliates if any one of them seeks SBA financial assistance for use in connection with the joint venture.

(2) Except as provided in paragraph (f)(3) of this section, concerns submit-

ting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.

(3) *Exclusion from affiliation.* (i) A joint venture or teaming arrangement of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under paragraph (f) of this section so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:

(A) The procurement qualifies as a "bundled" requirement, at any dollar value, within the meaning of § 125.2(d)(1)(i) of this chapter; or

(B) The procurement is other than a "bundled" requirement within the meaning of § 125.2(d)(1)(i) of this chapter, and:

(1) For a procurement having a revenue-based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the SIC code assigned to the contract; or

(2) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds \$10 million.

(ii) A joint venture or teaming arrangement of at least one 8(a) Participant and one or more other business concerns may submit an offer for a competitive 8(a) procurement without regard to affiliation under paragraph (f) of this section so long as the requirements of 13 CFR 124.513(b)(1) are met.

(iii) Two firms approved by SBA to be a mentor and protege under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement, provided the protege qualifies as small for the size standard corresponding to the SIC code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519.

(4) A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the

contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

(5) For size purposes, a concern must include in its revenues its proportionate share of joint venture receipts.

(g) *Affiliation based on franchise and license agreements.* The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

[61 FR 3286, Jan. 31, 1996, as amended at 62 FR 26381, May 14, 1997; 63 FR 35738, June 30, 1998; 64 FR 57370, Oct. 25, 1999]

§ 121.104 How does SBA calculate annual receipts?

(a) *Definitions.* In determining annual receipts of a concern:

(1) *Receipts* means “total income” (or in the case of a sole proprietorship, “gross income”) plus the “cost of goods sold” as these terms are defined or reported on Internal Revenue Service (IRS) Federal tax return forms (Form 1120 for corporations; Form 1120S for Subchapter S corporations; Form 1065 for partnerships; and Form 1040, Schedule F for farm or Schedule C for other sole proprietorships). However, the term receipts excludes net capital gains or losses, taxes collected for and remitted to a taxing authority if included in gross or total income, proceeds from the transactions between a concern and its domestic or foreign affiliates (if also excluded from gross or total income on a consolidated return filed with the IRS), and amounts collected for another by a travel agent, real estate agent, advertising agent, or conference management service provider.

(2) *Completed fiscal year* means a taxable year including any short period. Taxable year and short period have the meaning attributed to them by the IRS.

(3) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

(b) *Period of measurement.* (1) Annual receipts of a concern which has been in business for 3 or more completed fiscal years means the receipts of the concern over its last 3 completed fiscal years divided by three.

(2) Annual receipts of a concern which has been in business for less than 3 complete fiscal years means the receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Annual receipts of a concern which has been in business 3 or more complete fiscal years but has a short year as one of those years means the receipts for the short year and the two full fiscal years divided by the number of weeks in the short year and the two full fiscal years, multiplied by 52.

(c) *Use of information other than the Federal tax return.* Where other information gives SBA reason to regard Federal Income Tax returns as false, SBA may base its size determination on such other information.

(d) *Annual receipts of affiliates.* (1) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period or before small business self-certification, the annual receipts in determining size status include the receipts of both firms. Furthermore, this aggregation applies for the entire applicable period used in computing size rather than only for the period after the affiliation arose. Receipts are determined for the concern and its affiliates in accordance with paragraph (b) of this section even though this may result in different periods being used to calculate annual receipts.

(2) The annual receipts of a former affiliate are not included as annual receipts if affiliation ceased before the date used for determining size. This exclusion of annual receipts of a former affiliate applies during the entire period used in computing size, rather

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than only for the period after which the affiliation ceased .

§ 121.105 How does SBA define “business concern or concern”?

(a) A business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

(b) A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

(c) A firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity. In such a case, the annual receipts and employees of the predecessor will be taken into account in determining size.

§ 121.106 How does SBA calculate number of employees?

(a) Employees counted in determining size include all individuals employed on a full-time, part-time, temporary, or other basis. SBA will consider the totality of the circumstances, including factors relevant for tax purposes, in determining whether individuals are employees of the concern in question.

(b) Where the size standard is number of employees, the method for determining a concern’s size includes the following principles:

(1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.

(2) Part-time and temporary employees are counted the same as full-time employees.

(3) If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

(4) The treatment of employees of former affiliates or recently acquired affiliates is the same as for size determinations using annual receipts in § 121.104(d).

§ 121.107 How does SBA determine a concern’s “primary industry”?

In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

§ 121.108 What are the penalties for misrepresentation of size status?

In addition to other laws which may be applicable, section 16(d) of the Small Business Act, 15 U.S.C. 645(d), provides severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs. Section 16(a) of the Act also provides, in part, for criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing in any way the actions of the Agency.

SIZE STANDARDS USED TO DEFINE SMALL BUSINESS CONCERNS

§ 121.201 What size standards has SBA identified by Standard Industrial Classification codes?

The size standards described in this section apply to all SBA programs unless otherwise specified. The size standards themselves are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small. The following is a listing of size

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standards for industries under the SIC System. Size standards are listed by Division and apply to all industries in that Division except those specifically listed with separate size standards for a specific two-digit major group or

four-digit industry code. The industry code applicable to a business that cannot be otherwise classified will be SIC code 9999, Nonclassifiable Establishments, with a corresponding size standard of \$5.0 million in annual receipts.

SIZE STANDARDS BY SIC INDUSTRY

| SIC code and description | Size standards in number of employees or millions of dollars |
|--|--|
| DIVISION A—AGRICULTURE, FORESTRY AND FISHING | |
| MAJOR GROUP 01—AGRICULTURAL PRODUCTION CROPS | \$0.5 |
| MAJOR GROUP 02—LIVESTOCK AND ANIMAL SPECIALTIES | \$0.5 |
| EXCEPT: | |
| 0211 Beef Cattle Feedlots (Custom) | \$1.5 |
| 0252 Chicken Eggs | \$9.0 |
| MAJOR GROUP 07—AGRICULTURAL SERVICES | \$5.0 |
| MAJOR GROUP 08—FORESTRY | \$5.0 |
| MAJOR GROUP 09—FISHING, HUNTING, AND TRAPPING | \$3.0 |
| DIVISION B—MINING | |
| MAJOR GROUP 10—METAL MINING | 500 |
| MAJOR GROUP 12—COAL MINING | 500 |
| MAJOR GROUP 13—OIL AND GAS EXTRACTION AND MAJOR GROUP 14—MINING AND QUARRYING OF NONMETALLIC MINERALS, EXCEPT FUELS. | 500 |
| EXCEPT: | |
| 1081 Metal Mining Services | \$5.0 |
| 1241 Coal Mining Services | \$5.0 |
| 1382 Oil and Gas Field Exploration Services | \$5.0 |
| 1389 Oil and Gas Field Services, N.E.C. | \$5.0 |
| 1481 Nonmetallic Minerals Services, Except Fuels | \$5.0 |
| DIVISION C—CONSTRUCTION | |
| MAJOR GROUP 15—GENERAL BUILDING CONTRACTORS | \$17.0 |
| MAJOR GROUP 16—HEAVY CONSTRUCTION, NON BUILDING | \$17.0 |
| EXCEPT: | |
| 1629 (Part) Dredging and Surface Cleanup Activities | \$13.5 ¹ |
| MAJOR GROUP 17—CONSTRUCTION—SPECIAL TRADE CONTRACTORS | \$7.0 |
| DIVISION D—MANUFACTURING,² | 500 |
| EXCEPT: | |
| 2032 Canned Specialties | 1,000 |
| 2033 Canned Fruits, Vegetables, Preserves, Jams and Jellies | 500 ³ |
| 2043 Cereal Breakfast Foods | 1,000 |
| 2046 Wet Corn Milling | 750 |
| 2052 Cookies and Crackers | 750 |
| 2062 Cane Sugar Refining | 750 |
| 2063 Beet Sugar | 750 |
| 2076 Vegetable Oil Mills, Except Corn, Cottonseed, and Soybean | 1,000 |
| 2079 Shortening, Table Oils, Margarine, and Other Edible Fats and Oils, N.E.C. | 750 |
| 2085 Distilled and Blended Liquors | 750 |
| 2111 Cigarettes | 1,000 |
| 2211 Broadwoven Fabric Mills, Cotton | 1,000 |
| 2261 Finishers of Broadwoven Fabrics of Cotton | 1,000 |
| 2295 Coated Fabrics, Not Rubberized | 1,000 |
| 2296 Tire Cord and Fabrics | 1,000 |
| 2611 Pulp Mills | 750 |
| 2621 Paper Mills | 750 |
| 2631 Paperboard Mills | 750 |
| 2656 Sanitary Food Containers, Except Folding | 750 |
| 2657 Folding Paperboard Boxes, Including Sanitary | 750 |
| 2812 Alkalies and Chlorine | 1,000 |
| 2813 Industrial Gases | 1,000 |
| 2816 Inorganic Pigments | 1,000 |
| 2819 Industrial Inorganic Chemicals, N.E.C. | 1,000 |
| 2821 Plastics Materials, Synthetic Resins, and Nonvulcanizable Elastomers | 750 |
| 2822 Synthetic Rubber (Vulcanizable Elastomers) | 1,000 |
| 2823 Cellulosic Manmade Fibers | 1,000 |

SIZE STANDARDS BY SIC INDUSTRY—Continued

| SIC code and description | | Size standards in number of employees or millions of dollars |
|--------------------------|---|--|
| 2824 | Manmade Organic Fibers, Except Cellulosic | 1,000 |
| 2833 | Medicinal Chemicals and Botanical Products | 750 |
| 2834 | Pharmaceutical Preparations | 750 |
| 2841 | Soap and Other Detergents, Except Specialty Cleaners | 750 |
| 2865 | Cyclic Organic Crudes and Intermediates, and Organic Dyes and Pigments | 750 |
| 2869 | Industrial Organic Chemicals, N.E.C. | 1,000 |
| 2873 | Nitrogenous Fertilizers | 1,000 |
| 2892 | Explosives | 750 |
| 2911 | Petroleum Refining | 1,500 ⁴ |
| 2952 | Asphalt Felts and Coatings | 750 |
| 3011 | Tires and Inner Tubes | 1,000 ⁵ |
| 3021 | Rubber and Plastics Footwear | 1,000 |
| 3211 | Flat Glass | 1,000 |
| 3221 | Glass Containers | 750 |
| 3229 | Pressed and Blown Glass and Glassware, N.E.C | 750 |
| 3241 | Cement, Hydraulic | 750 |
| 3261 | Vitreous China Plumbing Fixtures and China and Earthenware Fittings and Bathroom Accessories | 750 |
| 3275 | Gypsum Products | 1,000 |
| 3292 | Asbestos Products | 750 |
| 3296 | Mineral Wool | 750 |
| 3297 | Nonclay Refractories | 750 |
| 3312 | Steel Works, Blast Furnaces (Including Coke Ovens), and Rolling Mills | 1,000 |
| 3313 | Electrometallurgical Products, Except Steel | 750 |
| 3315 | Steel Wiredrawing and Steel Nails and Spikes | 1,000 |
| 3316 | Cold-Rolled Steel Sheet, Strip, and Bars | 1,000 |
| 3317 | Steel Pipe and Tubes | 1,000 |
| 3331 | Primary Smelting and Refining of Copper | 1,000 |
| 3334 | Primary Production of Aluminum | 1,000 |
| 3339 | Primary Smelting and Refining of Nonferrous Metals, Except Copper and Aluminum | 750 |
| 3351 | Rolling, Drawing, and Extruding of Copper | 750 |
| 3353 | Aluminum Sheet, Plate, and Foil | 750 |
| 3354 | Aluminum Extruded Products | 750 |
| 3355 | Aluminum Rolling and Drawing, N.E.C | 750 |
| 3356 | Rolling, Drawing, and Extruding of Nonferrous Metals, Except Copper and Aluminum | 750 |
| 3357 | Drawing and Insulating of Nonferrous Wire | 1,000 |
| 3398 | Metal Heat Treating | 750 |
| 3399 | Primary Metal Products, N.E.C | 750 |
| 3411 | Metal Cans | 1,000 |
| 3431 | Enameled Iron and Metal Sanitary Ware | 750 |
| 3482 | Small Arms Ammunition | 1,000 |
| 3483 | Ammunition, Except for Small Arms | 1,500 |
| 3484 | Small Arms | 1,000 |
| 3511 | Steam, Gas, and Hydraulic Turbines, and Turbine Generator Set Units | 1,000 |
| 3519 | Internal Combustion Engines, N.E.C | 1,000 |
| 3531 | Construction Machinery and Equipment | 750 |
| 3537 | Industrial Trucks, Tractors, Trailers, and Stackers | 750 |
| 3562 | Ball and Roller Bearings | 750 |
| 3571 | Electronic Computers | 1,000 |
| 3572 | Computer Storage Devices | 1,000 |
| 3575 | Computer Terminals | 1,000 |
| 3577 | Computer Peripheral Equipment, N.E.C | 1,000 |
| 3578 | Calculating and Accounting Machines, Except Electronic Computers | 1,000 |
| 3585 | Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment | 750 |
| 3612 | Power, Distribution, and Specialty Transformers | 750 |
| 3613 | Switchgear and Switchboard Apparatus | 750 |
| 3621 | Motors and Generators | 1,000 |
| 3624 | Carbon and Graphite Products | 750 |
| 3625 | Relays and Industrial Controls | 750 |
| 3631 | Household Cooking Equipment | 750 |
| 3632 | Household Refrigerators and Home and Farm Freezers | 1,000 |
| 3633 | Household Laundry Equipment | 1,000 |
| 3634 | Electric Housewares and Fans | 750 |
| 3635 | Household Vacuum Cleaners | 750 |
| 3641 | Electric Lamp Bulbs and Tubes | 1,000 |
| 3651 | Household Audio and Video Equipment | 750 |
| 3652 | Phonograph Records and Prerecorded Audio Tapes and Disks | 750 |
| 3661 | Telephone and Telegraph Apparatus | 1,000 |
| 3663 | Radio and Television Broadcasting and Communications Equipment | 750 |

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SIZE STANDARDS BY SIC INDUSTRY—Continued

| SIC code and description | Size standards in number of employees or millions of dollars |
|--|--|
| 3669 Communications Equipment, N.E.C | 750 |
| 3671 Electron Tubes | 750 |
| 3692 Primary Batteries, Dry and Wet | 1,000 |
| 3694 Electrical Equipment for Internal Combustion Engines | 750 |
| 3695 Magnetic and Optical Recording Media | 1,000 |
| 3699 Electrical Machinery, Equipment, and Supplies, N.E.C | 750 |
| 3711 Motor Vehicles and Passenger Car Bodies | 1,000 |
| 3714 Motor Vehicle Parts and Accessories | 750 |
| 3716 Motor Homes | 1,000 |
| 3721 Aircraft | 1,500 |
| 3724 Aircraft Engines and Engine Parts | 1,000 |
| 3728 Aircraft Parts and Auxiliary Equipment, N.E.C | 1,000 ⁹ |
| 3731 Shipbuilding and Repair of Nuclear Propelled Ships | 1,000 |
| Shipbuilding of Nonnuclear Propelled Ships and Nonpropelled Ships | 1,000 |
| Ship Repair (Including Overhauls and Conversions) Performed on Nonnuclear Propelled and Nonpropelled Ships East of the 108 Meridian. | 1,000 |
| Ship Repair (Including Overhauls and Conversions) Performed on Nonnuclear Propelled and Nonpropelled Ships West of the 108 Meridian. | 1,000 |
| 3743 Railroad Equipment | 1,000 |
| 3761 Guided Missiles and Space Vehicles | 1,000 |
| 3764 Guided Missile and Space Vehicle Propulsion Units and Propulsion Units Parts | 1,000 |
| 3769 Guided Missile and Space Vehicle Parts and Auxiliary Equipment, N.E.C | 1,000 |
| 3795 Tanks and Tank Components | 1,000 |
| 3812 Search, Detection, Navigation, Guidance, Aeronautical, and Nautical Systems and Instruments. | 750 |
| 3996 Linoleum, Asphalted-Felt-Base, and other Hard Surface Floor Coverings, N.E.C | 750 |
| DIVISION E—TRANSPORTATION, COMMUNICATIONS, ELECTRIC, GAS, AND SANITARY SERVICES | |
| MAJOR GROUP 40—RAILROAD TRANSPORTATION | 1500 |
| EXCEPT: | |
| 4013 Railroad Switching and Terminal Establishments | 500 |
| MAJOR GROUP 41—LOCAL AND SUBURBAN TRANSIT AND INTERURBAN HIGHWAY PASSENGER TRANSPORTATION. | \$5.0 |
| MAJOR GROUP 42—MOTOR FREIGHT TRANSPORTATION AND WAREHOUSING | \$18.5 |
| EXCEPT: | |
| 4212 (Part) Garbage and Refuse Collection, Without Disposal | \$6.0 |
| 4231 Terminal and Joint Terminal Maintenance Facilities for Motor Freight Transportation | \$5.0 |
| MAJOR GROUP 44—WATER TRANSPORTATION | 500 |
| EXCEPT: | |
| 4491 Marine Cargo Handling | \$18.5 |
| 4492 Towing and Tugboat Services | \$5.0 |
| 4493 Marinas | \$5.0 |
| 4499 Water Transportation Services, N.E.C. | \$5.0 |
| —Offshore Marine Water Transportation Services | \$20.5 |
| MAJOR GROUP 45—TRANSPORTATION BY AIR | 1500 |
| EXCEPT: | |
| 4522 Air Transportation, Nonscheduled | 1500 |
| —Offshore Marine Air Transportation Services | \$20.5 |
| 4581 Airports, Flying Fields, and Airport Terminal Services | \$5.0 |
| MAJOR GROUP 46—PIPELINES, EXCEPT NATURAL GAS, | 1500 |
| EXCEPT: | |
| 4619 Pipelines, N.E.C. | \$25.0 |
| MAJOR GROUP 47—TRANSPORTATION SERVICES, | \$5.0 |
| EXCEPT: | |
| 4724 Travel Agencies | \$1.0 ⁶ |
| 4731 Arrangement of Transportation of Freight and Cargo | \$18.5 |
| 4783 Packing and Crating | \$18.5 |
| MAJOR GROUP 48—COMMUNICATIONS. | |
| 4812 Radiotelephone Communications | 1,500 |
| 4813 Telephone Communications, Except Radiotelephone | 1,500 |
| 4822 Telegraph and Other Message Communications | \$5.0 |
| 4832 Radio Broadcasting Stations | \$5.0 |
| 4833 Television Broadcasting Stations | \$10.5 |
| 4841 Cable and Other Pay Television Services | \$11.0 |
| 4899 Communications Services, N.E.C. | \$11.0 |
| MAJOR GROUP 49—ELECTRIC, GAS, AND SANITARY SERVICES, | \$5.0 |
| EXCEPT: | |
| 4911 Electric Services | 4 million megawatt hrs. |
| 4924 Natural Gas Distribution | 500 |

SIZE STANDARDS BY SIC INDUSTRY—Continued

| SIC code and description | Size standards in number of employees or millions of dollars |
|--|--|
| 4953 Refuse Systems | \$6.0 |
| 4961 Steam and Air-Conditioning Supply | \$9.0 |
| DIVISION F—WHOLESALE TRADE | 100 |
| (Not Applicable to Government procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies.) | |
| DIVISION G—RETAIL TRADE | \$5.0 |
| (Not Applicable to Government procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies.) | |
| EXCEPT: | |
| 5271 Mobile Home Dealers | \$9.5 |
| 5311 Department Stores | \$20.0 |
| 5331 Variety Stores | \$8.0 |
| 5411 Grocery Stores | \$20.0 |
| 5511 Motor Vehicle Dealers (New and Used) | \$21.0 |
| 5521 Motor Vehicle Dealers (Used Only) | \$17.0 |
| 5541 Gasoline Service Stations | \$6.5 |
| 5599 Automobile Dealers, N.E.C. | \$5.0 |
| —Aircraft Dealers, Retail | \$7.5 |
| 5611 Men's and Boys' Clothing and Accessory Stores | \$6.5 |
| 5621 Women's Clothing Stores | \$6.5 |
| 5651 Family Clothing Stores | \$6.5 |
| 5661 Shoe Stores | \$6.5 |
| 5722 Household Appliance Stores | \$6.5 |
| 5731 Radio, Television, and Consumer Electronics Stores | \$6.5 |
| 5734 Computer and Computer Software Stores | \$6.5 |
| 5812 (Part) Food Service, Institutional | \$15.0 |
| 5961 Catalog and Mail-Order Houses | \$18.5 |
| 5983 Fuel Oil Dealers | \$9.0 |
| DIVISION H—FINANCE, INSURANCE, AND REAL ESTATE | \$5.0 |
| EXCEPT: | |
| 6021–6082 National and Commercial Banks, Savings Institutions and Credit Unions | \$100 Million in assets ⁷ |
| 6331 Fire, Marine, and Casualty Insurance | 1,500 |
| 6515 (Part) Leasing of Building Space to Federal Government by Owners | \$15.0 ⁸ |
| 6531 Real Estate Agents and Managers | \$1.5 ⁶ |
| DIVISION I—SERVICES | \$5.0 |
| EXCEPT: | |
| 7211 Power Laundries, Family and Commercial | \$10.5 |
| 7213 Linen Supply | \$10.5 |
| 7216 Drycleaning Plants, Except Rug Cleaning | \$3.5 |
| 7217 Carpet and Upholstery Cleaning | \$3.5 |
| 7218 Industrial Launderers | \$10.5 |
| 7311 Advertising Agencies | \$5.0 ⁶ |
| 7312 Outdoor Advertising Services | \$5.0 ⁶ |
| 7313 Radio, Television, and Publishers' Advertising Representatives | \$5.0 ⁶ |
| 7319 Advertising, N.E.C. | \$5.0 ⁶ |
| 7349 Building Cleaning and Maintenance Services, N.E.C. | \$12.0 |
| 7371 Computer Programming Services | \$18.0 |
| 7372 Prepackaged Software | \$18.0 |
| 7373 Computer Integrated Systems Design | \$18.0 |
| 7374 Computer Processing and Data Preparation and Processing Services | \$18.0 |
| 7375 Information Retrieval Services | \$18.0 |
| 7376 Computer Facilities Management Services | \$18.0 |
| 7377 Computer Rental and Leasing | \$18.0 |
| 7378 Computer Maintenance and Repair | \$18.0 |
| 7379 Computer Related Services, N.E.C. | \$18.0 |
| 7381 Detective, Guard, and Armored Car Services | \$9.0 |
| 7382 Security Systems Services | \$9.0 |
| 7389 Business Services, N.E.C. | \$5.0 |
| Except, Map Drafting Services, Mapmaking (Including Aerial) and Photogrammetric Mapping Services. | \$4.0 |
| 7513 Truck Rental and Leasing Without Drivers | \$18.5 |
| 7514 Passenger Car Rental | \$18.5 |
| 7515 Passenger Car Leasing | \$18.5 |
| 7534 Tire Retreading and Repair Shops | \$10.5 |

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SIZE STANDARDS BY SIC INDUSTRY—Continued

| SIC code and description | Size standards in number of employees or millions of dollars |
|---|--|
| 7699 Repair Shops and Related Services, N.E.C | \$5.0 ⁹ |
| 7812 Motion Picture and Video Tape Production | \$21.5 |
| 7819 Services Allied to Motion Picture Production | \$21.5 |
| 7822 Motion Picture and Video Tape Distribution | \$21.5 |
| 8299 (Part) Flight Training Services | \$18.5 |
| 8711 Engineering Services | \$4.0 |
| Military and Aerospace Equipment and Military Weapons | \$20.0 |
| Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992 | \$20.0 |
| Marine Engineering and Naval Architecture | \$13.5 |
| 8712 Architectural Services (Other than Naval) | \$4.0 |
| 8713 Surveying Services | \$4.0 |
| 8721 Accounting, Auditing, and Bookkeeping Services | \$6.0 |
| 8731 Commercial Physical and Biological Research | 500 ¹⁰ |
| Aircraft | 1,500 |
| Aircraft Parts, and Auxiliary Equipment, and Aircraft Engines and Engine Parts | 1,000 |
| Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Units Parts, and their Auxiliary Equipment and Parts | 1,000 |
| 8741 (Part) Conference Management Services | \$5.0 ⁶ |
| 8744 Facilities Support Management Services | \$5.0 ¹¹ |
| Base Maintenance | \$20.0 ¹² |
| Environmental Remediation Services | 500 ¹³ |

Footnotes:

¹ SIC code 1629—Dredging: To be considered small for purposes of Government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern.

² SIC Division D—Manufacturing: For rebuilding machinery or equipment on a factory basis, or equivalent, use the SIC code for a newly manufactured product. Concerns performing major rebuilding or overhaul activities do not necessarily have to meet the criteria for being a “manufacturer” although the activities may be classified under a manufacturing SIC code. Ordinary repair services or preservation are not considered rebuilding.

³ SIC code 2033: For purposes of Government procurement for food canning and preserving, the standard of 500 employees excludes agricultural labor as defined in section 3306(k) of the Internal Revenue Code, 26 U.S.C. 3306(k).

⁴ SIC code 2911: For purposes of Government procurement, the firm may not have more than 1,500 employees nor more than 75,000 barrels per day capacity of petroleum-based inputs, including crude oil or bona fide feedstocks. Capacity includes owned or leased facilities as well as facilities under a processing agreement or an arrangement such as an exchange agreement or a throughput. The total product to be delivered under the contract must be at least 90 percent refined by the successful bidder from either crude oil or bona fide feedstocks.

⁵ SIC code 3011: For purposes of Government procurement, a firm is small for bidding on a contract for pneumatic tires within Census Classification codes 30111 and 30112, provided that:

(1) The value of tires within Census Classification codes 30111 and 30112 which it manufactured in the United States during the previous calendar year is more than 50 percent of the value of its total worldwide manufacture;

(2) The value of pneumatic tires within Census Classification codes 30111 and 30112 comprising its total worldwide manufacture during the preceding calendar year was less than 5 percent of the value of all such tires manufactured in the United States during that period; and

(3) the value of the principal product which it manufactured or otherwise produced, or sold worldwide during the preceding calendar year is less than 10 percent of the total value of such products manufactured or otherwise produced or sold in the United States during that period.

⁶ SIC codes 4724, 6531, 7311, 7312, 7313, 7319, and 8741 (part): As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenue.

⁷ A financial institution’s assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. *Assets* for the purposes of this size standard means the assets defined according to the Federal Financial Institutions Examination Council 034 call report form.

⁸ SIC code 6515: Leasing of building space to the Federal Government by Owners: For Government procurement, a size standard of \$15.0 million in gross receipts applies to the owners of building space leased to the Federal Government. The standard does not apply to an agent.

⁹ SIC codes 7699 and 3728: Contracts for the rebuilding or overhaul of aircraft ground support equipment on a contract basis are classified under SIC code 3728.

¹⁰ SIC code 8731: For research and development contracts requiring the delivery of a manufactured product, the appropriate size standard is that of the manufacturing industry.

(1) Research and Development means laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

(2) For purposes of the Small Business Innovation Research (SBIR) program only, a different definition has been established by law. See § 121.701.

(3) Research and development for guided missiles and space vehicles includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

¹¹ Facilities Management, a component of SIC code 8744, includes establishments, not elsewhere classified, which provide overall management and the personnel to perform a variety of related support services in operating a complete facility in or around a specific building, or within another business or Government establishment. Facilities management means furnishing three or more personnel supply services which may include, but are not limited to, secretarial services, typists, telephone answering, reproduction or mimeograph service, mailing service, financial or business management, public relations, conference planning, travel arrangements, word processing, maintaining files and/or libraries, switchboard operation, writers, bookkeeping, minor office equipment maintenance and repair, or use of information systems (not programming).

¹² SIC code 8744:

(1) If one of the activities of base maintenance, as defined in paragraph (2) of this footnote, can be identified with a separate industry and that activity (or industry) accounts for 50 percent or more of the value of an entire contract, then the proper size standard is that of the particular industry, and not the base maintenance size standard.

(2) "Base Maintenance" requires the performance of three or more separate activities in the areas of service or special trade construction industries. If services are performed, these activities must each be in a separate SIC code including, but not limited to, Janitorial and Custodial Service, Fire Prevention Service, Messenger Service, Commissary Service, Protective Guard Service, and Grounds Maintenance and Landscaping Service. If the contract requires the use of special trade contractors (plumbing, painting, plastering, carpentry, etc.), all such special trade construction activities are considered a single activity and classified as Base Housing Maintenance. Since Base Housing Maintenance is only one activity, two additional activities are required for a contract to be classified as "Base Maintenance."

¹³SIC code 8744: (1) For SBA assistance as a small business concern in the industry of Environmental Remediation Services, other than for Government procurement, a concern must be engaged primarily in furnishing a range of services for the remediation of a contaminated environment to an acceptable condition including, but not limited to, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, containment, remedial action, removal of contaminated materials, storage of contaminated materials and security and site closeouts. If one of such activities accounts for 50 percent or more of a concern's total revenues, employees, or other related factors, the concern's primary industry is that of the particular industry and not the Environmental Remediation Services Industry.

(2) For purposes of classifying a Government procurement as Environmental Remediation Services, the general purpose of the procurement must be to restore a contaminated environment and also the procurement must be composed of activities in three or more separate industries with separate SIC codes or, in some instances (e.g., engineering), smaller sub-components of SIC codes with separate, distinct size standards. These activities may include, but are not limited to, separate activities in industries such as: Heavy Construction; Special Trade Construction; Engineering Services; Architectural Services; Management Services; Refuse Systems; Sanitary Services; Not Elsewhere Classified; Local Trucking Without Storage; Testing Laboratories; and Commercial, Physical and Biological Research. If any activity in the procurement can be identified with a separate SIC code, or component of a code with a separate distinct size standard, and that industry accounts for 50 percent or more of the value of the entire procurement, then the proper size standard is the one for that particular industry, and not the Environmental Remediation Service size standard.

[61 FR 3286, Jan. 31, 1996; 61 FR 6412, Feb. 20, 1996; 61 FR 7306, Feb. 27, 1996; 61 FR 7986, Mar. 1, 1996; 61 FR 43119, Aug. 20, 1996; 64 FR 26280, May 14, 1999]

SIZE ELIGIBILITY REQUIREMENTS FOR SBA FINANCIAL ASSISTANCE

§ 121.301 What size standards are applicable to financial assistance programs?

(a) For Business Loans and Disaster Loans (other than physical disaster loans), an applicant must not exceed the size standard for the industry in which:

(1) The applicant combined with its affiliates is primarily engaged; and

(2) The applicant alone is primarily engaged.

(b) For Development Company programs, an applicant must meet one of the following standards:

(1) Including its affiliates, tangible net worth not in excess of \$6 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of \$2 million; or

(2) The same standards applicable under paragraph (a) of this section.

(c) For the Small Business Investment Company (SBIC) program, an applicant must meet one of the following standards:

(1) Including its affiliates, tangible net worth not in excess of \$18 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding 2 completed

fiscal years not in excess of \$6 million; or

(2) The same standards applicable under paragraph (a) of this section.

(d) For Surety Bond Guarantee assistance—

(1) Any construction (general or special trade) concern or concern performing a contract for services is small if its average annual receipts do not exceed \$5.0 million.

(2) Any concern not specified in paragraph (d)(1) of this section must meet the size standard for the primary industry in which it, combined with its affiliates, is engaged.

(e) The applicable size standards for the purpose of all SBA financial assistance programs, excluding the Surety Bond Guarantee assistance program, are increased by 25 percent whenever the applicant agrees to use the assistance within a labor surplus area. Labor surplus areas are listed monthly in the Department of Labor publication called "Area Trends."

§ 121.302 When does SBA determine the size status of an applicant?

(a) The size of an applicant for SBA financial assistance is determined as of the date the application for such financial assistance is accepted for processing by SBA, except for the Disaster Loan and Preferred Lenders programs.

(b) For the Preferred Lenders program, size is determined as of the date of approval of the loan by the Preferred Lender.

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(c) For disaster loan assistance (other than physical disaster loans), size status is determined as of the date the disaster commenced, as set forth in the Disaster Declaration. For pre-disaster mitigation loans, size status is determined as of the date SBA accepts the application for processing.

(d) Changes in size subsequent to the applicable date when size is determined will not disqualify an applicant for assistance.

[61 FR 3286, Jan. 31, 1996, as amended at 64 FR 48276, Sept. 3, 1999]

§ 121.303 What size procedures are used by SBA before it makes a formal size determination?

(a) A concern that submits an application for financial assistance is deemed to have certified that it is small under the applicable size standard. SBA may question the concern's status based on information supplied in the application or from any other source.

(b) A small business investment company, a development company, a surety bond company, or a preferred lender may accept as true the size information provided by an applicant, unless credible evidence to the contrary is apparent.

(c) Size is initially considered by the individual with final financial assistance authority. This is not a formal size determination. A formal determination may be requested prior to a denial of eligibility based on size.

(d) An applicant may request a formal size determination when assistance has been denied for size ineligibility. Except for disaster loan eligibility, a request for a formal size determination must be made to the Government Contracting Area Director serving the area in which the headquarters of the applicant is located, regardless of the location of the parent company or affiliates. For disaster loan assistance, the request for a size determination must be made to the Area Director for the Disaster Area Office which denied the assistance.

(e) There are no time limitations for making a formal size determination for purposes of financial assistance. The official making the formal size determination must provide a copy of the

determination to the applicant, to the requesting SBA official, and to other interested SBA program officials.

§ 121.304 What are the size requirements for refinancing an existing SBA loan?

(a) A concern that applies to refinance an existing SBA loan or guarantee will be considered small for the refinancing even though its size has increased since the date of the original financing to exceed its applicable size standard, provided that:

(1) The increase in size is due to natural growth (as distinguished from merger, acquisition or similar management action); and

(2) SBA determines that refinancing is necessary to protect the Government's financial interest.

(b) If a concern's size has increased other than by natural growth, the concern and its affiliates must be small at the time the application for refinancing is accepted for processing by SBA.

§ 121.305 What size eligibility requirements exist for obtaining business loans relating to particular procurements?

A concern qualified as small for a particular procurement, including an 8(a) subcontract, is small for financial assistance directly and primarily relating to the performance of the particular procurement.

SIZE ELIGIBILITY REQUIREMENTS FOR GOVERNMENT PROCUREMENT

§ 121.401 What procurement programs are subject to size determinations?

The requirements set forth in §§ 121.401 through 121.413 cover all procurement programs for which status as a small business is required, including the small business set-aside program, SBA's Certificate of Competency program, SBA's 8(a) Business Development program, the Small Business Subcontracting program authorized under section 8(d) of the Small Business Act, the Federal Small Disadvantaged Business

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(SDB) programs, the HUBZone program, and the Very Small Business (VSB) program.

[63 FR 46642, Sept. 2, 1998]

§ 121.402 What size standards are applicable to procurement assistance programs?

(a) A concern must meet the size standard for the SIC code specified in the solicitation.

(b) The procuring agency contracting officer, or authorized representative, designates the proper SIC code and size standard in a solicitation, selecting the SIC code which best describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry descriptions in the SIC Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased. Other factors considered include previous Government procurement classifications of the same or similar products or services, and the classification which would best serve the purposes of the Small Business Act. A procurement is usually classified according to the component which accounts for the greatest percentage of contract value.

(c) The SIC code assigned to a procurement and its corresponding size standard is final unless timely appealed to SBA's Office of Hearings and Appeals (OHA), or unless SBA assigns a SIC code or size standard as provided in paragraph (d) of this section.

(d) An unclear, incomplete or missing SIC code designation or size standard in the solicitation may be clarified, completed or supplied by SBA in connection with a formal size determination or size appeal.

(e) Any offeror or other interested party adversely affected by a SIC code designation or size standard designation may appeal the designations to OHA under part 134 of this chapter.

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§ 121.403 Are SBA size determinations and SIC code designations binding on parties?

Formal size determinations and SIC code designations made by authorized SBA officials are binding upon the parties. Opinions otherwise provided by SBA officials to contracting officers or others are advisory in nature, and are not binding or appealable.

§ 121.404 When does SBA determine the size status of a business concern?

Generally, SBA determines the size status of a concern (including its affiliates) as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer including price. The following are two exceptions to this rule:

(a) The size status of an applicant for a Certificate of Competency (COC) relating to an unrestricted procurement is determined as of the date of the concern's application for the COC.

(b) Size status for purposes of compliance with the nonmanufacturer rule set forth in § 121.406(b)(1) and the ostensible subcontractor rule set forth in § 121.103(f)(3) is determined as of the date of the best and final offer.

§ 121.405 May a business concern self-certify its small business size status?

(a) A concern must self-certify it is small under the size standard specified in the solicitation, or as clarified, completed or supplied by SBA pursuant to § 121.402(d).

(b) A contracting officer may accept a concern's self-certification as true for the particular procurement involved in the absence of a written protest by other offerors or other credible information which causes the contracting officer or SBA to question the size of the concern.

(c) Procedures for protesting the self-certification of an offeror are set forth in §§ 121.1001 through 121.1009.

§ 121.406 How does a small business concern qualify to provide manufactured products under small business set-aside or MED procurements?

(a) *General.* In order to qualify as a small business concern for a small business set-aside or 8(a) contract to provide manufactured products, an offeror must either:

(1) Be the manufacturer of the end item being procured (and the end item must be manufactured or produced in the United States); or

(2) Comply with the requirements of paragraph (b), (c) or (d) of this section as a nonmanufacturer, a kit assembler or a supplier under Simplified Acquisition Procedures.

(b) *Nonmanufacturers.* (1) A concern may qualify for a requirement to provide manufactured products as a nonmanufacturer if it:

(i) Does not exceed 500 employees;

(ii) Is primarily engaged in the wholesale or retail trade and normally sells the items being supplied to the general public; and

(iii) Will supply the end item of a small business manufacturer or processor made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(3) of this section.

(2) For size purposes, there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item. SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:

(i) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit; and

(ii) The importance of the elements added by the concern to the function of the end item, regardless of their relative value.

(3) The Administrator or designee may waive the requirement set forth in paragraph (b)(1)(iii) of this section under the following two circumstances:

(i) The contracting officer has determined that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications (including period for performance) required by a particular solicitation and SBA reviews and accepts that determination; or

(ii) SBA determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market.

(4) The two waiver possibilities identified in paragraph (b)(3) of this section are called "individual" and "class" waivers respectively, and the procedures for them are contained in § 121.1204.

(5) Any SBA waiver of the nonmanufacturer rule has no effect on requirements external to the Small Business Act which involve domestic sources of supply, such as the Buy American Act.

(c) *Kit assemblers.* (1) Where the manufactured item being acquired is a kit of supplies or other goods provided by an offeror for a special purpose, the offeror cannot exceed 500 employees, and 50 percent of the total value of the components of the kit must be manufactured by business concerns in the United States which are small under the size standards for the SIC codes of the components being assembled. The offeror need not itself be the manufacturer of any of the items assembled.

(2) Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such item shall be excluded from the calculation of total value in paragraph (c)(1) of this section.

(d) *Simplified Acquisition Procedures.* Where the procurement of a manufactured item is processed under Simplified Acquisition Procedures, as defined in § 13.101 of the Federal Acquisition Regulation (FAR) (48 CFR 13.101), and where the anticipated cost of the procurement will not exceed \$25,000, the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States, and the offeror does not exceed 500 employees. The offeror need not itself be the manufacturer of any of the items acquired.

[61 FR 3286, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996]

§ 121.407 What are the size procedures for multiple item procurements?

If a procurement calls for two or more specific end items or types of services with different size standards and the offeror may submit an offer on any or all end items or types of services, the offeror must meet the size standard for each end item or service item for which it submits an offer. If the procurement calls for more than one specific end item or type of service and an offeror is required to submit an offer on all items, the offeror may qualify as a small business for the procurement if it meets the size standard of the item which accounts for the greatest percentage of the total contract value.

§ 121.408 What are the size procedures for SBA's Certificate of Competency Program?

(a) A firm which applies for a COC must file an "Application for Small Business Size Determination" (SBA Form 355). If the initial review of SBA Form 355 indicates the applicant, including its affiliates, is small for purposes of the COC program, SBA will process the application for COC. If the review indicates the applicant, including its affiliates, is other than small, SBA will initiate a formal size determination as set forth in § 121.1009. In such a case, SBA will not further process the COC application until a formal size determination is made.

(b) A concern is ineligible for a COC if a formal SBA size determination finds the concern other than small.

§ 121.409 What size standard applies in an unrestricted procurement for Certificate of Competency purposes?

For the purpose of receiving a Certificate of Competency in an unrestricted procurement, the applicable size standard is that corresponding to the SIC code set forth in the solicitation. For a manufactured product, a concern must also furnish a domestically produced or manufactured product, regardless of the size status of the product manufacturer. The offeror need not be the manufacturer of any of the items acquired.

§ 121.410 What are the size standards for SBA's Section 8(d) Subcontracting Program?

For subcontracting purposes pursuant to section 8(d) of the Small Business Act, a concern is small:

(a) For subcontracts of \$10,000 or less which relate to Government procurements, if its number of employees (including its affiliates) does not exceed 500 employees. However, subcontracts for engineering services awarded under the National Energy Policy Act of 1992 have the same size standard as Military and Aerospace Equipment and Military Weapons under SIC code 8711;

(b) For subcontracts exceeding \$10,000 which relate to Government procurements, if its number of employees or average annual receipts (including its affiliates) does not exceed the size standard for the product or service it is providing on the subcontract; and

(c) For subcontracts for financial services, if the concern (including its affiliates) is a commercial bank or savings and loan association whose assets do not exceed \$100 million.

§ 121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

(a) Prime contractors may rely on the information contained in SBA's Procurement Automated Source System (PASS), or equivalent data base maintained or sanctioned by SBA, as

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an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list. Even though a concern is on a small business source list, it must still qualify and self-certify as a small business at the time it submits its offer as a section 8(d) subcontractor.

(b) Upon determination of the successful subcontract offeror for a competitive subcontract, but prior to award, the prime contractor must inform each unsuccessful subcontract offeror in writing of the name and location of the apparent successful offeror.

(c) The self-certification of a concern subcontracting or proposing to subcontract under section 8(d) of the Small Business Act may be protested by the contracting officer, the prime contractor, the appropriate SBA official or any other interested party.

§ 121.412 What are the size procedures for partial small business set-asides?

A firm is required to meet size standard requirements only for the small business set-aside portion of a procurement, and is not required to qualify as a small business for the unrestricted portion.

§ 121.413 What size must a concern be to be eligible for the Very Small Business program?

A concern is a very small business (see § 125.7 of this chapter) if, together with its affiliates, it has no more than 15 employees and its average annual receipts do not exceed \$1 million.

[63 FR 46642, Sept. 2, 1998]

SIZE ELIGIBILITY REQUIREMENTS FOR SALES OR LEASE OF GOVERNMENT PROPERTY

§ 121.501 What programs for sales or leases of Government property are subject to size determinations?

Sections 121.501 through 121.512 apply to small business size determinations for the purpose of the sale or lease of Government property, including the Timber Sales Program, the Special Salvage Timber Sales Program, and

the sale of Government petroleum, coal and uranium.

§ 121.502 What size standards are applicable to programs for sales or leases of Government property?

(a) Unless otherwise specified in this part—

(1) A concern primarily engaged in manufacturing is small for sales or leases of Government property if it does not exceed 500 employees;

(2) A concern not primarily engaged in manufacturing is small for sales or leases of Government property if it has annual receipts not exceeding \$2 million.

(b) Size status for such sales and leases is determined by the primary industry of the applicant business concern.

§ 121.503 Are SBA size determinations binding on parties?

Formal size determinations based upon a specific Government sale or lease, or made in response to a request from another Government agency under § 121.901, are binding upon the parties. Other SBA opinions provided to contracting officers or others are only advisory, and are not binding or appealable.

§ 121.504 When does SBA determine the size status of a business concern?

SBA determines the size status of a concern (including its affiliates) as of the date the concern submits a written self-certification that it is small to the Government as part of its initial offer including price where there is a specific sale or lease at issue, or as set forth in § 121.903 if made in response to a request of another Government agency.

§ 121.505 What is the effect of a self-certification?

(a) A contracting officer may accept a concern's self-certification as true for the particular sale or lease involved, in the absence of a written protest by other offerors or other credible information which would cause the contracting officer or SBA to question the size of the concern.

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(b) Procedures for protesting the self-certification of an offeror are set forth in §§ 121.1001 through 121.1009.

§ 121.506 What definitions are important for sales or leases of Government-owned timber?

(a) *Forest product industry* means logging, wood preserving, and the manufacture of lumber and wood related products such as veneer, plywood, hardboard, particle board, or wood pulp, and of products of which lumber or wood related products are the principal raw materials.

(b) *Logging of timber* means felling and bucking, yarding, and/or loading. It does not mean hauling.

(c) *Manufacture of logs* means, at a minimum, breaking down logs into rough cuts of the finished product.

(d) *Sell* means, in addition to its usual and customary meaning, the exchange of sawlogs for sawlogs on a product-for-product basis with or without monetary adjustment, and an indirect transfer, such as the sale of the assets of a concern after it has been awarded one or more set-aside sales of timber.

(e) *Significant logging of timber* means that a concern uses its own employees to perform at least two of the following: felling and bucking, yarding, and loading.

§ 121.507 What are the size standards and other requirements for the purchase of Government-owned timber (other than Special Salvage Timber)?

(a) To be small for purposes of the sale of Government-owned timber (other than Special Salvage Timber) a concern must:

(1) Be primarily engaged in the logging or forest products industry;

(2) Not exceed 500 employees, taking into account its affiliates; and

(3) If it does not intend at the time of the offer to resell the timber—

(i) Agree that it will manufacture the logs with its own facilities or those of another business which meets the requirements of paragraphs (a)(1) and (a)(2) of this section;

(ii) Agree that if it eventually resells the timber, it will resell no more than

30% of the sawtimber volume to other businesses which do not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(iii) Agree that if it becomes acquired or controlled by a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume to businesses which do meet the requirements of paragraphs (a)(1) and (a)(2) of this section; or

(4) If it intends at the time of offer to resell the timber—

(i) Agree that it will not sell more than 30% of such timber (50% of such timber if the concern is an Alaskan business) to a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(ii) Agree that if it becomes acquired or controlled by a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume (or at least 50% of the sawtimber volume, if it is an Alaskan business) to businesses which meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(b) For a period of three years following the date upon which a concern purchases timber under a small business set-aside (other than through the Special Salvage Timber Sale program), it must maintain a record of:

(1) The name, address and size status of every concern to which it sells the timber or sawlogs; and

(2) The species, grades and volumes of sawlogs sold.

(c) For a period of three years following the date upon which a concern purchases timber, it must by contract require all small business repurchasers of the sawlogs or timber it purchased under the small business set-aside to maintain the records described in paragraph (b) of this section.

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§ 121.508 What are the size standards and other requirements for the purchase of Government-owned Special Salvage Timber?

(a) In order to purchase Government-owned Special Salvage Timber from the United States Forest Service or the Bureau of Land Management as a small business, a concern must:

(1) Be primarily engaged in the logging or forest product industry;

(2) Have, together with its affiliates, no more than twenty-five employees during any pay period for the last twelve months; and

(3) If it does not intend at the time of offer to resell the timber—

(i) Agree that it will manufacture a significant portion of the logs with its own employees; and

(ii) Agree that it will log the timber only with its own employees or with employees of another business which is eligible for award of a Special Salvage Timber sales contract; or

(4) If it intends at the time of offer to resell the timber, agree that it will perform a significant portion of timber logging with its own employees and that it will subcontract the remainder of the timber logging to a concern which is eligible for award of a Special Salvage Timber sales contract.

§ 121.509 What is the size standard for leasing of Government land for coal mining?

A concern is small for this purpose if it:

(a) Together with its affiliates, does not have more than 250 employees;

(b) Maintains management and control of the actual mining operations of the tract; and

(c) Agrees that if it subleases the Government land, it will be to another small business, and that it will require its sublessors to agree to the same.

§ 121.510 What is the size standard for leasing of Government land for uranium mining?

A concern is small for this purpose if it, together with its affiliates, does not have more than 100 employees.

§ 121.511 What is the size standard for buying Government-owned petroleum?

A concern is small for this purpose if it is primarily engaged in petroleum refining and meets the size standard for a petroleum refining business.

§ 121.512 What is the size standard for stockpile purchases?

A concern is small for this purpose if:

(a) It is primarily engaged in the purchase of materials which are not domestic products; and

(b) Its annual receipts, together with its affiliates, do not exceed \$42 million.

SIZE ELIGIBILITY REQUIREMENTS FOR THE MINORITY ENTERPRISE DEVELOPMENT (MED) PROGRAM

§ 121.601 What is a small business for purposes of admission to SBA's Minority Enterprise Development (MED) program?

An applicant must be small under the size standard corresponding to its primary industry classification in order to be admitted to SBA's Minority Enterprise Development (MED) program.

§ 121.602 At what point in time must a MED applicant be small?

A MED applicant must be small for its primary industry at the time SBA certifies it for admission into the program.

§ 121.603 How does SBA determine whether a Participant is small for a particular MED subcontract?

(a) *Self certification by Participant.* A MED Participant must certify that it qualifies as a small business under the SIC code assigned to a particular MED subcontract as part of its initial offer including price to the procuring agency. The Participant also must submit a copy of its offer, including its self-certification as to size, to the appropriate SBA district office at the same time it submits the offer to the procuring agency. See § 121.404 for the time at which size is determined for, and § 121.406 for the applicability of the nonmanufacturer rule to, MED procurements.

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(b) *Verification of size by SBA.* Within 30 days of its receipt of a Participant's size self-certification for a particular MED subcontract, the SBA district office serving the geographic area in which the Participant's principal office is located will review the Participant's self-certification and determine if it is small for purposes of that subcontract. The SBA district office will review the Participant's most recent financial statements and other relevant data and then notify the Participant of its decision.

(c) *Changes in size between date of self-certification and date of award.* (1) Where SBA verifies that the selected Participant is small for a particular procurement, subsequent changes in size up to the date of award, except those due to merger with or acquisition by another business concern, will not affect the firm's size status for that procurement.

(2) Where a Participant has merged with or been acquired by another business concern between the date of its self-certification and the date of award, the concern must recertify its size status, and SBA must verify the new certification before award can occur.

(d) *Finding Participant to be other than small.* (1) A Participant may request a formal size determination (pursuant to §§121.1001 through 121.1009) with the SBA Government Contracting Area Office serving the geographic area in which the principal office of the Participant is located within 5 working days of its receipt of notice from the SBA district office that it is not small for a particular MED subcontract.

(2) Where the Participant does not timely request a formal size determination, SBA may accept the procurement in support of another Participant, or may rescind its acceptance of the offer for the MED program, as appropriate.

§ 121.604 Are MED Participants considered small for purposes of other SBA assistance?

A concern which SBA determines to be a small business for the award of a MED subcontract will be considered to have met applicable size eligibility requirements of other SBA programs where that assistance directly and pri-

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marily relates to the performance of the MED subcontract in question.

SIZE ELIGIBILITY REQUIREMENTS FOR THE SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM

§ 121.701 What SBIR programs are subject to size determinations?

(a) These sections apply to size status for award of a funding agreement pursuant to the Small Business Innovation Development Act of 1982 (Pub. L. 97-219, 15 U.S.C. 638(e) through (k)).

(b) *Funding agreement officer* means a contracting officer, a grants officer, or a cooperative agreement officer.

(c) *Funding agreement* means any contract, grant or cooperative agreement entered into between any Federal agency and any small business for the performance of experimental, developmental, or research work funded in whole or in part by the Federal Government. Such work includes:

(1) A systematic, intensive study directed toward greater knowledge or understanding of the subject studied;

(2) A systematic study directed specifically toward applying new knowledge to meet a recognized need; or

(3) A systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.

§ 121.702 What size standards are applicable to the SBIR program?

To be eligible to compete for award of funding agreements in SBA's Small Business Innovation Research (SBIR) program, a business concern must:

(a) Be at least 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States; and

(b) Not have more than 500 employees, including its affiliates.

§ 121.703 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions based upon a specific funding agreement, and are binding upon the parties. Other

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SBA opinions provided to funding agreement officers or others, are only advisory, and are not binding or appealable.

§ 121.704 When does SBA determine the size status of a business concern?

The size status of a concern for the purpose of a funding agreement under the SBIR program is determined as of the date of the award for both Phase I and Phase II SBIR awards.

§ 121.705 Must a business concern self-certify its size status?

(a) A firm must self-certify it is small in its SBIR funding proposal.

(b) A funding agreement officer may accept a concern's self-certification as true for the particular funding agreement involved in the absence of a written protest by other offerors or other credible information which would cause the funding agreement officer or SBA to question the size of the concern.

(c) Procedures for protesting an offeror's self-certification are set forth in §§ 121.1001 through 121.1009.

SIZE ELIGIBILITY REQUIREMENTS FOR PAYING REDUCED PATENT FEES

§ 121.801 May patent fees be reduced if a concern is small?

These sections apply to size status for the purpose of paying reduced patent fees authorized by Pub. L. 97-247, 96 Stat. 317. The eligibility requirements for independent inventors and non-profit organizations for the purpose of paying reduced patent fees are set forth in regulations of the Patent and Trademark Office of the Department of Commerce, 37 CFR 1.9, 1.27, 1.28.

§ 121.802 What size standards are applicable to reduced patent fees programs?

A concern eligible for reduced patent fees is one:

(a) Whose number of employees, including affiliates, does not exceed 500 persons; and

(b) Which has not assigned, granted, conveyed, or licensed (and is under no

obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under this section.

§ 121.803 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions, based upon a specific patent application pursuant to the rules of the Patent and Trademark Office, Department of Commerce, and are binding upon the parties. Other SBA opinions provided to patent applicants or others are only advisory, and are not binding or appealable.

§ 121.804 When does SBA determine the size status of a business concern?

Size status is determined as of the date of the patent applicant's written verification of size.

§ 121.805 May a business concern self-certify its size status?

(a) A concern verifies its size status with its submission of its patent application.

(b) Any attempt to establish small size status improperly (fraudulently, through gross negligence, or otherwise) may result in remedial action by the Patent and Trademark Office.

(c) In the absence of credible information indicating otherwise, the Patent and Trademark Office may accept the verification by the concern as a small business as true.

(d) Questions concerning the size verification are resolved initially by the Patent and Trademark Office. If not verified as small, the applicant may request a formal SBA size determination.

SIZE ELIGIBILITY REQUIREMENTS FOR COMPLIANCE WITH PROGRAMS OF OTHER AGENCIES

§ 121.901 Can other Government agencies obtain SBA size determinations?

Upon request by another Government agency, SBA will provide a size determination, under SBA rules, standards and procedures, for its use in determining compliance with small business requirements of its statutes, regulations or programs.

§ 121.902 What size standards are applicable to programs of other agencies?

(a) *SBA size standards.* The size standards for compliance with programs of other agencies are those for SBA programs which are most comparable to the programs of such other agencies, unless otherwise agreed by the agency and SBA.

(b) *Special size standards.* (1) Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size criteria. In limited circumstances, if they decide the SBA size standard is not appropriate, then agency heads may establish a small business definition for the exclusive use of such program which is more appropriate, but only when:

(i) The size standard is first proposed for public comment pursuant to the Administrative Procedure Act, 4 U.S.C. 553;

(ii) The proposed size standard provides for determining size measured by average number of employees over 12 months for manufacturing concerns, average annual revenues over three years for concerns providing services, and data over a period of not less than three years for all other concerns (unless approved by SBA, “annual receipts” and “number of employees” must be determined in accordance with §§ 121.104 and 121.106, respectively); and

(iii) The proposed size standard is approved by SBA’s Administrator.

(2) In order to receive the approval of SBA’s Administrator, the agency head must:

(i) Request approval prior to publishing the proposed rule containing the size standard. The request must include: an explanation of the contemplated industry size standard, the reasons the SBA size standard is not

appropriate, and the reasons the proposed size standard would be appropriate; and a certification that there will be compliance with the criteria set forth in paragraphs (b)(1)(i) and (b)(1)(ii) of this section; and

(ii) Agree to provide written notice to SBA’s Administrator prior to publishing the contemplated size standard as a final rule. The notice must include: a copy of the intended final rule, including the preamble, or a separate written justification for the intended size standard followed by a copy of the intended final rule and preamble prior to its publication; copies of all public comments relating to the size standard received in response to the proposed rule; and any other supporting documentation relevant to the size standard and requested by SBA’s Administrator.

(3) When approving any size standard established pursuant to subsection (b) of this section, SBA’s Administrator will ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries, and consider other relevant factors.

(4) Where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, the department or agency may, after consultation with the SBA Office of Advocacy, establish a size standard different from SBA’s which is more appropriate for such analysis.

§ 121.903 When does SBA determine the size status of a business concern?

For the purpose of compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of the date set forth in the request of the other agency.

PROCEDURES FOR SIZE PROTESTS AND REQUESTS FOR FORMAL SIZE DETERMINATIONS

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§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, the following entities may file a size protest in connection with a particular procurement or sale:

- (i) Any offeror;
- (ii) The contracting officer;
- (iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, or the Associate Administrator for Government Contracting; and
- (iv) Other interested parties. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

(2) For competitive 8(a) contracts, the following entities may protest:

- (i) Any offeror;
- (ii) The contracting officer; or
- (iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring activity is located or the district office that services the apparent successful offeror, or the Associate Administrator for 8(a) Business Development.

(3) For SBA's Subcontracting Program, the following entities may protest:

- (i) The prime contractor;
- (ii) The contracting officer;
- (iii) Other potential subcontractors;
- (iv) The responsible SBA Government Contracting Area Director or the Associate Administrator for Government Contracting; and
- (v) Other interested parties.

(4) For SBA's Small Business Innovation Research (SBIR) Program, the following entities may protest:

- (i) A prospective offeror;
- (ii) The funding agreement officer;
- (iii) The responsible SBA Government Contracting Area Director or the

Assistant Administrator for Technology; and

- (iv) Other interested parties.

(5) For the Department of Defense's Small Disadvantaged Business (SDB) Program, and any other similar program of another Federal agency, the following entities may file a protest in connection with a particular SDB procurement:

- (i) Any offeror for the specific SDB requirement;
- (ii) The contracting officer; and
- (iii) The responsible SBA Government Contracting Area Director, the Associate Administrator for Government Contracting, or the Associate Administrator for MED.

(6) For SBA's HUBZone program, the following entities may protest in connection with a particular HUBZone procurement:

- (i) Any concern that submits an offer for a specific HUBZone set-aside contract;

(ii) Any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone SBC;

- (iii) The contracting officer; and
- (iv) The Associate Administrator for Government Contracting, or designee.

(7) For any unrestricted Government procurement in which status as a small business may be beneficial, including, but not limited to, the award of a contract to a small business where there are tie bids, the opportunity to seek a Certificate of Competency by a small business, and SDB price evaluation preferences, the following entities may protest in connection with a particular procurement:

- (i) Any offeror;
- (ii) The contracting officer; and
- (iii) The responsible SBA Government Contracting Area Director, the Associate Administrator for Government Contracting, or the Associate Administrator for MED.

(b) *Request for Size Determinations.* (1) For SBA's Financial Assistance Programs, the following entities may request a formal size determination:

- (i) The applicant for assistance; and
- (ii) The SBA official with authority to take final action on the assistance

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requested. That official may also request the appropriate Government Contracting Area Office to determine whether affiliation exists between an applicant for financial assistance and one or more other entities for purposes of determining whether the applicant would exceed the loan limit amount imposed by § 120.151 of this chapter.

(2) For SBA's 8(a) BD program:

(i) Concerning initial or continued 8(a) BD eligibility, the following entities may request a formal size determination:

(A) The 8(a) BD applicant concern or Participant; or

(B) The Assistant Administrator of the Division of Program Certification and Eligibility or the Associate Administrator for 8(a)BD.

(ii) Concerning individual sole source 8(a) contract awards, the following entities may request a formal size determination:

(A) The Participant nominated for award of the particular sole source contract;

(B) The SBA program official with authority to execute the 8(a) contract; or

(C) The SBA District Director in the district office that services the Participant, or the Associate Administrator for 8(a)BD.

(3) For SBA's Certificate of Competency Program, the following entities may request a formal size determination:

(i) The offeror who has applied for a COC; and

(ii) The responsible SBA Government Contracting Area Director or the Associate Administrator for Government Contracting.

(4) For SBA's sale or lease of government property, the following entities may request a formal size determination:

(i) The responsible SBA Government Contracting Area Director or the Associate Administrator for Government Contracting; and

(ii) Authorized officials of other Federal agencies administering a property sales program.

(5) For eligibility to pay reduced patent fees, the following entities may request a formal size determination:

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(i) The applicant for the reduced patent fees; and

(ii) The Patent and Trademark Office.

(6) For purposes of determining compliance with small business requirements of another Government agency program not otherwise specified in this section, an official with authority to administer the program involved may request a formal size determination.

[61 FR 3286, Jan. 31, 1996, as amended at 63 FR 31907, June 11, 1998; 63 FR 35739, June 30, 1998]

§ 121.1002 Who makes a formal size determination?

The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination, with the exception of size determinations for purposes of the Disaster Loan Program, which will be made by the Disaster Area Office Director or designee responsible for the area in which the disaster occurred.

§ 121.1003 Where should a size protest be filed?

A protest involving a government procurement or sale must be filed with the contracting officer for the procurement or sale, who must forward the protest to the SBA Government Contracting Area Office serving the area in which the headquarters of the protested concern is located, regardless of the location of any parent company or affiliates.

§ 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA.* (1) *Non-negotiated procurement or sale.* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening.

(2) *Negotiated procurement.* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the

protestor of the identity of the prospective awardee.

(3) *Multiple award schedule.* On a multiple award schedule procurement set aside for small business, protests will be considered timely if received by SBA at any time prior to the expiration of the contract period (including renewals).

(b) *Protests by contracting officers or SBA.* The time limitations in paragraph (a) of this section do not apply to contracting officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (e) of this section.

(c) *Effect of contract award.* A timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest.

(d) *Untimely protests.* A protest received after the allotted time limits must still be forwarded to SBA. SBA will dismiss untimely protests.

(e) *Premature protests.* A protest filed by any party, including the contracting officer, before bid opening or notification to offerors of the selection of the apparent successful offer will be dismissed as premature.

§ 121.1005 How must a protest be filed with the contracting officer?

A protest must be delivered to the contracting officer by hand, telegram, mail, FAX, or telephone. If a protest is made by telephone, the contracting officer must later receive a confirming letter either within the 5-day period in § 121.1004(a)(1) or postmarked no later than one day after the date of the telephone protest.

§ 121.1006 When will a size protest be referred to an SBA Government Contracting Area Office?

(a) A contracting officer who receives a protest (other than from SBA) must forward the protest promptly to the SBA Government Contracting Area Office serving the area in which the headquarters of the offeror is located.

(b) A contracting officer's referral must contain the following information:

(1) The protest and any accompanying materials;

(2) A copy of the self-certification as to size;

(3) Identification of the applicable size standard;

(4) A copy of the solicitation;

(5) Identification of the date of bid opening or notification provided to unsuccessful offerors;

(6) The date on which the protest was received; and

(7) A complete address and point of contact for the protested concern.

§ 121.1007 Must a protest of size status relate to a particular procurement and be specific?

(a) *Particular procurement.* A protest challenging the size of a concern which does not pertain to a particular procurement or sale will not be acted on by SBA.

(b) *A protest must include specific facts.* A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

(c) *Non-specific protests will be dismissed.* Protests which do not contain sufficient specificity will be dismissed by SBA.

§ 121.1008 What happens after SBA receives a size protest or a request for a formal size determination?

(a) When a size protest is received, the SBA Government Contracting Area Director, or designee, will promptly notify the contracting officer, the protested concern, and the protestor that a protest has been received. In the event the size protest pertains to a requirement involving SBA's HUBZone Program, the Government Contracting Area Director will advise the AA/HUB of receipt of the protest. In the event the size protest pertains to a requirement involving SBA's SBIR Program,

the Government Contracting Area Director will advise the Assistant Administrator for Technology of the receipt of the protest. SBA will provide a copy of the protest to the protested concern along with a blank SBA Application for Small Business Size Determination (SBA Form 355) by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt. SBA will ask the protested concern to respond to the allegations of the protestor.

(b) When SBA receives a request for a formal size determination in accord with § 121.1001(b), SBA will provide a blank copy of SBA Form 355 to the concern whose size is at issue.

(c) The protested concern or concern whose size is at issue must return the completed SBA Form 355 and all other requested information to SBA within 3 working days from the date of receipt of the blank form from SBA. SBA has discretion to grant an extension of time to file the form. The firm must attach to the completed SBA Form 355 its answers to the allegations contained in the protest, where applicable, together with any supporting material.

(d) If a concern does not submit a completed SBA Form 355, answers to the protest allegations, or other requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the form, any information missing from it, or other missing information would show or tend to show that the concern is other than a small business.

[61 FR 3286, Jan. 31, 1996, as amended at 63 FR 31908, June 11, 1998]

§ 121.1009 What are the procedures for making the size determination?

(a) *Time frame for making size determination.* After receipt of a protest or a request for a formal size determination, SBA will make a formal size determination within 10 working days, if possible.

(b) *Basis for determination.* The size determination will be based primarily on information supplied by the protestor or the entity requesting the size determination and the subject concern. The determination, however, may also be based on other grounds not

raised in the protest or request for size determination. SBA may utilize other information in its files and may make inquiries including requests to the protestor, the protested concern and any alleged affiliates, or other persons for additional specific information.

(c) *Burden of persuasion.* The concern whose size is under consideration has the burden of establishing its small business size.

(d) *Weight of evidence.* SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

(e) *Formal size determination.* The SBA will base its formal size determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.

(f) *Notification of determination.* SBA will promptly notify the contracting officer, the protestor, and the protested offeror, as well as each affiliate or alleged affiliate, of the size determination. The notification will be by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt.

(g) *Results of an SBA size determination.* (1) A formal size determination becomes effective immediately and remains in full force and effect unless and until reversed by OHA.

(2) Once SBA has determined that a concern is other than small for purposes of a particular procurement, the concern cannot later become eligible for the procurement by reducing its size.

(3) A concern determined to be other than small for a particular size standard is ineligible for any procurement or assistance authorized by the Small Business Act or the Small Business Investment Act of 1958, requiring the same or a lower size standard, unless recertified as small pursuant to § 121.1010. Following an adverse size determination, a concern cannot again self-certify as small within the same or

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a lower size standard unless it is recertified as small by SBA. If it does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as small on a pending procurement or on another assistance application, the concern must immediately inform the officials responsible for the pending procurement or other requested assistance of the adverse size determination.

(h) *Limited reopening of size determinations.* In cases where the size determination contains clear administrative error or a clear mistake of fact, SBA may, in its sole discretion, reopen the size determination to correct the error or mistake, provided the case has not been accepted for review by OHA.

§ 121.1010 How does a concern become recertified as a small business?

(a) A concern may request SBA to recertify it as small at any time by filing an application for recertification with the Government Contracting Area Office responsible for the area in which the headquarters of the applicant is located, regardless of the location of parent companies or affiliates. No particular form is prescribed for the application; however, the request for recertification must be accompanied by a current completed SBA Form 355 and any other information sufficient to show a significant change in its ownership, management, or other factors bearing on its status as a small concern.

(b) Recertification will not be required nor will the prohibition against future self-certification apply if the adverse SBA size determination is based solely on a finding of affiliation due to a joint venture (e.g., ostensible subcontracting) limited to a particular Government procurement or property sale, or is based on an ineligible manufacturer where the eligible small business bidder or offeror is a nonmanufacturer on a particular Government procurement.

(c) A denial of an application for recertification is a formal size determination and may be reviewed by OHA at the discretion of that office.

(d) The granting of an application for recertification has future effect only.

While it is a formal size determination, notice of recertification is required to be given only to the applicant.

APPEALS OF SIZE DETERMINATIONS AND SIC CODE DESIGNATIONS

§ 121.1101 Are formal size determinations subject to appeal?

There is no right of appeal of a size determination. OHA, however, may, in its sole discretion, review a formal size determination made by a SBA Government Contracting Area Office or by a Disaster Area Office. Unless OHA accepts a petition for review of a formal size determination, the size determination made by a SBA Government Contracting Area Office or by a Disaster Area Office is the final decision of SBA. The procedures for requesting discretionary reviews by OHA of formal size determinations are set forth in part 134 of this chapter.

§ 121.1102 Are SIC code designations subject to appeal?

Appeals may be made to OHA, which has exclusive jurisdiction to determine appeals of SIC code designations pursuant to part 134 of this chapter.

§ 121.1103 What are the procedures for appealing a SIC code designation?

(a) Generally, any interested party who has been adversely affected by a SIC code designation may appeal the designation to OHA. However, with respect to a particular sole source 8(a) contract, only the Associate Administrator for 8(a)BD may appeal.

(b) Procedures for perfecting SIC code appeals with OHA are contained in § 19.303 of the Federal Acquisition Regulations, 48 CFR 19.303.

[61 FR 3286, Jan. 31, 1996, as amended at 63 FR 35739, June 30, 1998]

Subpart B—Other Applicable Provisions

WAIVERS OF THE NONMANUFACTURER RULE FOR CLASSES OF PRODUCTS AND INDIVIDUAL CONTRACTS

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§ 121.1201 What is the Nonmanufacturer Rule?

The Nonmanufacturer Rule is set forth in § 121.406(b).

§ 121.1202 When will a waiver of the Nonmanufacturer Rule be granted for a class of products?

(a) A waiver for a class of products (class waiver) will be granted when there are no small business manufacturers or processors available to participate in the Federal market for that class of products.

(b) *Federal market* means acquisitions by the Federal Government from offerors located in the United States, or such smaller area as SBA designates if it concludes that the class of products is not supplied on a national basis.

(1) When considering the appropriate market area for a product, SBA presumes that the entire United States is the relevant Federal market, unless it is clearly demonstrated that a class of products cannot be procured on a national basis. This presumption may be particularly difficult to overcome in the case of manufactured products, since such items typically have a market area encompassing the entire United States.

(2) When considering geographic segmentation of a Federal market, SBA will not necessarily use market definitions dependent on airline radius, political, or SBA regional boundaries. Market areas typically follow established transportation routes rather than jurisdictional borders. SBA examines the following factors, among others, in cases where geographic segmentation for a class of products is urged:

(i) Whether perishability affects the area in which the product can practically be sold;

(ii) Whether transportation costs are high as a proportion of the total value of the product so as to limit the economic distribution of the product;

(iii) Whether there are legal barriers to transportation of the item;

(iv) Whether a fixed, well-delineated boundary exists for the purported market area and whether this boundary has been stable over time; and

(v) Whether a small business, not currently selling in the defined market

area, could potentially enter the market from another area and supply the market at a reasonable price.

(c) *Available to participate* in the context of the Federal market means that contractors exist that have been awarded or have performed a contract to supply a specific class of products to the Federal Government within 24 months from the date of the request for waiver, either directly or through a dealer, or who have submitted an offer on a solicitation for that class of products within that time frame.

(d) *Class of products* is an individual subdivision within a four-digit Industry Number as established by the Office of Management and Budget in the SIC Manual.

§ 121.1203 When will a waiver of the Nonmanufacturer Rule be granted for an individual contract?

An individual waiver for a product in a specific solicitation will be approved when the SBA Associate Administrator for Government Contracting reviews and accepts a contracting officer's determination that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of a solicitation, including the period of performance.

§ 121.1204 What are the procedures for requesting and granting waivers?

(a) *Waivers for classes of products.* (1) SBA may, at its own initiative, examine a class of products for possible waiver of the Nonmanufacturer Rule.

(2) Any interested person, business, association, or Federal agency may submit a request for a waiver for a particular class of products. Requests should be addressed or hand-carried to the Associate Administrator of Government Contracting, Small Business Administration, 409 3rd Street SW., Washington, DC 20416.

(3) Requests for a waiver of a class of products need not be in any particular form, but should include a statement of the class of products to be waived, the applicable SIC code, and detailed information on the efforts made to identify small business manufacturers or processors for the class.

(4) If SBA decides that there are small business manufacturers or processors in the Federal procurement market, it will deny the request for waiver, issue notice of the denial, and provide the names, addresses, and telephone numbers of the sources found. If SBA does not initially confirm the existence of small business manufacturers or processors in the Federal market, it will:

(i) Publish notices in the Commerce Business Daily and the FEDERAL REGISTER seeking information on small business manufacturers or processors, announcing a notice of intent to waive the Nonmanufacturer Rule for that class of products and affording the public a 15-day comment period; and

(ii) If no small business sources are identified, publish a notice in the FEDERAL REGISTER stating that no small business sources were found and that a waiver of the Nonmanufacturer Rule for that class of products has been granted.

(5) An expedited procedure for issuing a class waiver may be used for emergency situations, but only if the contracting officer provides a determination to the Associate Administrator for Government Contracting that the procurement is proceeding under the authority of FAR § 6.302-2 (48 CFR 6.302-2) for “unusual and compelling urgency,” or provides a determination materially the same as one of unusual and compelling urgency. Under the expedited procedure, if a small business manufacturer or processor is not identified by a PASS search, the SBA will grant the waiver for the class of products and then publish a notice in the FEDERAL REGISTER. The notice will state that a waiver has been granted, and solicit public comment for future procurements.

(6) The decision by the Associate Administrator for Government Contracting to grant or deny a waiver is the final decision by the Agency.

(7) A waiver of the Nonmanufacturer Rule for classes of products has no specific time limitation. SBA will, however, periodically review existing class waivers to the Nonmanufacturer Rule to determine if small business manufacturers or processors have become available to participate in the Federal

market for the waived classes of products and the waiver should be terminated.

(i) Upon SBA’s receipt of evidence that a small business manufacturer or processor exists in the Federal market for a waived class of products, the waiver will be terminated by the Associate Administrator for Government Contracting. This evidence may be discovered by SBA during a periodic review of existing waivers or may be brought to SBA’s attention by other sources.

(ii) SBA will announce its intent to terminate a waiver for a class of products through the publication of a notice in the FEDERAL REGISTER, asking for comments regarding the proposed termination.

(iii) Unless public comment reveals that no small business manufacturer or processor in fact exists for the class of products in question, SBA will publish a final Notice of Termination in the FEDERAL REGISTER.

(b) *Individual waivers for specific solicitations.* (1) A contracting officer’s request for a waiver of the Nonmanufacturer Rule for specific solicitations need not be in any particular form, but must, at a minimum, include:

(i) A definitive statement of the specific item to be waived and justification as to why the specific item is required;

(ii) The solicitation number, SIC code, dollar amount of the procurement, and a brief statement of the procurement history;

(iii) A determination by the contracting officer that there are no known small business manufacturers or processors for the requested items (the determination must contain a narrative statement of the contracting officer’s efforts to search for small business manufacturers or processors of the item and the results of those efforts, and a statement by the contracting officer that there are no known small business manufacturers for the items and that no small business manufacturer or processor can reasonably be expected to offer the required items); and

(iv) For contracts expected to exceed \$500,000, a copy of the Statement of Work.

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(2) Requests should be addressed to the Associate Administrator for Government Contracting, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(3) SBA will examine the contracting officer's determination and any other information it deems necessary to make an informed decision on the individual waiver request. If SBA's research verifies that no small business manufacturers or processors exist for the item, the Associate Administrator for Government Contracting will grant an individual, one-time waiver. If a small business manufacturer or processor is found for the product in question, the Associate Administrator will deny the request. Either decision represents a final decision by SBA.

§ 121.1205 How is a list of previously granted class waivers obtained?

A list of classes of products for which waivers of the Nonmanufacturer Rule have been granted will be maintained in SBA's Procurement Automated Source System (PASS). A list of such waivers may also be obtained by contacting the Office of Government Contracting at the Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, or at the nearest SBA Government Contracting Area Office.

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AUTHORITY: 15 U.S.C. 634(b)(6), 636(b), 636(c) and 636(f); Pub. L. 102-395, 106 Stat. 1828, 1864; and Pub. L. 103-75, 107 Stat. 739.

SOURCE: 61 FR 3304, Jan. 31, 1996, unless otherwise noted.

OVERVIEW

§ 123.1 What do these rules cover?

This part covers the disaster loan programs authorized under the Small Business Act, 15 U.S.C. 636(b), (c), and (f). Since SBA cannot predict the occurrence or magnitude of disasters, it reserves the right to change the rules in this part, without advance notice, by publishing interim emergency regulations in the FEDERAL REGISTER.

§ 123.2 What are disaster loans and disaster declarations?

SBA offers low interest, fixed rate loans to disaster victims, enabling them to repair or replace property damaged or destroyed in declared disasters. It also offers such loans to affected small businesses to help them recover from economic injury caused by such disasters. Disaster declarations are official notices recognizing that specific geographic areas have been damaged by floods and other acts of nature, riots, civil disorders, or industrial accidents such as oil spills. These disasters are sudden events which cause severe physical damage, and do not include slower physical occurrences such as shoreline erosion or gradual land settling. Sudden physical events that cause substantial economic injury may be disasters even if they do not cause physical damage to a victim's property. Past examples include ocean conditions causing significant displace-

ment (major ocean currents) or closure (toxic algae blooms) of customary fishing waters, as well as contamination of food or other products for human consumption from unforeseeable and unintended events beyond the control of the victims.

§ 123.3 How are disaster declarations made?

(a) There are four ways in which disaster declarations are issued which make SBA disaster loans possible:

(1) The President declares a Major Disaster and authorizes Federal assistance, including individual assistance (temporary housing and Individual and Family Grant Assistance).

(2) SBA makes a physical disaster declaration, based on the occurrence of at least a minimum amount of physical damage to buildings, machinery, equipment, inventory, homes and other property. Such damage usually must meet the following tests:

(i) In any county or other smaller political subdivision of a State or U.S. possession, at least 25 homes or 25 businesses, or a combination of at least 25 homes, businesses, or other eligible institutions, each sustain uninsured losses of 40 percent or more of the estimated fair replacement value or pre-disaster fair market value of the damaged property, whichever is lower; or

(ii) In any such political subdivision, at least three businesses each sustain uninsured losses of 40 percent or more of the estimated fair replacement value or pre-disaster fair market value of the damaged property, whichever is lower, and, as a direct result of such physical damage, 25 percent or more of the work force in their community would be unemployed for at least 90 days; and

(iii) The Governor of the State in which the disaster occurred submits a written request to SBA for a physical disaster declaration by SBA (OMB Approval No. 3245-0121). This request should be delivered to the SBA Disaster Area Office serving the region where the disaster occurred within 60 days of the date of the disaster.

(3) SBA makes an economic injury disaster declaration in response to a determination of a natural disaster by the Secretary of Agriculture.

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(4) SBA makes an economic injury declaration in reliance on a state certification that at least 5 small business concerns in a disaster area have suffered substantial economic injury as a result of the disaster and are in need of financial assistance not otherwise available on reasonable terms. The state certification must be signed by the Governor, must specify the county or counties or other political subdivisions in which the disaster occurred, and must be delivered (with supporting documentation) to the servicing SBA Disaster Area Office within 120 days of the disaster occurrence. The Administrator may, in a case of undue hardship, accept such request after 120 days have expired.

(b) SBA publishes notice of any disaster declaration in the FEDERAL REGISTER. The published notice will identify the kinds of assistance available, the date and nature of the disaster, and the deadline and location for filing loan applications. Additionally, SBA will use the local media to inform potential loan applicants where to obtain loan applications and otherwise to assist victims in applying for disaster loans. SBA will accept applications after the announced deadline only when SBA determines that the late filing resulted from substantial causes beyond the control of the applicant.

[61 FR 3304, Jan. 31, 1996, as amended at 64 FR 13667, Mar. 22, 1999]

§ 123.4 What is a disaster area and why is it important?

Each disaster declaration defines the geographical areas affected by the disaster. Only those victims located in the declared disaster area are eligible to apply for SBA disaster loans. When the President declares a major disaster, the Federal Emergency Management Agency defines the disaster area. In major disasters, economic injury disaster loans may be made for victims in contiguous counties or other political subdivisions. Disaster declarations issued by the Administrator of SBA include contiguous counties for both physical and economic injury assistance. Contiguous counties or other political subdivisions are those land areas which abut the land area of the declared disaster area without geographic

separation other than by a minor body of water, not to exceed one mile between the land areas of such counties.

§ 123.5 What kinds of loans are available?

SBA offers three kinds of disaster loans: physical disaster home loans, physical disaster business loans, and economic injury business loans. SBA makes these loans directly or in participation with a financial institution. If a loan is made in participation with a financial institution, SBA's share in that loan may not exceed 90 percent.

§ 123.6 What does SBA look for when considering a disaster loan applicant?

There must be reasonable assurance that you can repay your loan out of your personal or business cash flow, and you must have satisfactory credit and character. SBA will not make a loan to you if repayment depends upon the sale of collateral through foreclosure or any other disposition of assets owned by you. SBA is prohibited by statute from making a loan to you if you are engaged in the production or distribution of any product or service that has been determined to be obscene by a court.

§ 123.7 Are there restrictions on how disaster loans can be used?

You must use disaster loans to restore or replace your primary home (including a mobile home used as a primary residence) and your personal or business property as nearly as possible to their condition before the disaster occurred, and within certain limits, to protect damaged or destroyed real property from possible future similar disasters.

§ 123.8 Does SBA charge any fees for obtaining a disaster loan?

SBA does not charge points, closing, or servicing fees on any disaster loan. You will be responsible for payment of any closing costs owed to third parties, such as recording fees and title insurance premiums. If your loan is made in participation with a financial institution, SBA will charge a guarantee fee to the financial institution, which then

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may recover the guarantee fee from you.

§ 123.9 What happens if I don't use loan proceeds for the intended purpose?

(a) When SBA approves each loan application, it issues a loan authorization which specifies the amount of the loan, repayment terms, any collateral requirements, and the permitted use of loan proceeds. If you wrongfully misapply these proceeds, you will be liable to SBA for one and one-half times the proceeds disbursed to you as of the date SBA learns of your wrongful misapplication.

Wrongful misapplication means the willful use of any loan proceeds without SBA approval contrary to the loan authorization. If you fail to use loan proceeds for authorized purposes for 60 days or more after receiving a loan disbursement check, such non-use also is considered a wrongful misapplication of the proceeds.

(b) If SBA learns that you may have misapplied your loan proceeds, SBA will notify you at your last known address, by certified mail, return receipt requested. You will be given at least 30 days to submit to SBA evidence that you have not misapplied the loan proceeds or that you have corrected any such misapplication. Any failure to respond in time will be considered an admission that you misapplied the proceeds. If SBA finds a wrongful misapplication, it will cancel any undisbursed loan proceeds, call the loan, and begin collection measures to collect your outstanding loan balance and the civil penalty. You may also face criminal prosecution or civil or administrative action.

§ 123.10 What happens if I cannot use my insurance proceeds to make repairs?

If you must pay insurance proceeds to the holder of a recorded lien or encumbrance against your damaged property instead of using them to make repairs, you may apply to SBA for the full amount needed to make such repairs. If you voluntarily pay insurance proceeds to a recorded lienholder, your loan eligibility is reduced by the amount of the voluntary payment.

§ 123.11 Does SBA require collateral for any of its disaster loans?

Generally, SBA will not require that you pledge collateral to secure a disaster home loan or a physical disaster business loan of \$10,000 or less, or an economic injury disaster loan of \$5,000 or less. For loans larger than these amounts, you will be required to provide available collateral such as a lien on the damaged or replacement property, a security interest in personal property, or both.

(a) Sometimes a borrower, including affiliates as defined in part 121 of this title, will have more than one loan after a single disaster. In deciding whether collateral is required, SBA will add up all physical disaster loans to see if they exceed \$10,000 and all economic injury disaster loans to see if they exceed \$5,000.

(b) SBA will not decline a loan if you lack a particular amount of collateral as long as it is reasonably sure that you can repay your loan. If you refuse to pledge available collateral when requested by SBA, however, SBA may decline or cancel your loan.

§ 123.12 Are books and records required?

You must retain complete records of all transactions financed with your SBA loan proceeds, including copies of all contracts and receipts, for a period of 3 years after you receive your final disbursement of loan proceeds. If you have a physical disaster business or economic injury loan, you must also maintain current and accurate books of account, including financial and operating statements, insurance policies, and tax returns. You must retain applicable books and records for 3 years after your loan matures including any extensions, or from the date when your loan is paid in full, whichever occurs first. You must make available to SBA or other authorized government personnel upon request all such books and records for inspection, audit, and reproduction during normal business hours and you must also permit SBA and any participating financial institution to inspect and appraise your assets. (OMB Approval No. 3245-0110.)

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§ 123.13 What happens if my loan application is denied?

(a) If SBA denies your loan application, SBA will notify you in writing and set forth the specific reasons for the denial. Any applicant whose request for a loan is declined for reasons other than size (not being a small business) has the right to present information to overcome the reason or reasons for the decline and to request reconsideration in writing. (OMB Approval No. 3245-0122.)

(b) Any decline due to size can only be appealed as set forth in part 121 of this chapter.

(c) Any request for reconsideration must be received by the SBA office that declined the original application within six months of the date of the declined notice. After six months, a new loan application is required.

(d) A request for reconsideration must contain all significant new information that you rely on to overcome SBA's denial of your original loan application. Your request for reconsideration of a business loan application must also be accompanied by current business financial statements.

(e) If SBA declines your application a second time, you have the right to appeal in writing to the Area Director's Office. All appeals must be received by the office that declined the prior reconsideration within 30 days of the decline action. Your request must state that you are appealing, and must give specific reasons why the decline action should be reversed.

(f) The decision of the Area Director is final unless:

(1) The Area Director does not have authority to approve the requested loan;

(2) The Area Director refers the matter to the Associate Administrator for Disaster Assistance; or

(3) The Associate Administrator for Disaster Assistance, upon a showing of special circumstances, requests the Area Director's office to forward the matter to him or her for final consideration. Special circumstances may include, but are not limited to, policy considerations, alleged improper acts by SBA personnel or others in processing the application, and conflicting

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policy interpretations between two Area Offices.

§ 123.14 How does the Federal Debt Collection Procedures Act of 1990 apply?

(a) Under the Federal Debt Collection Procedures Act of 1990 (28 U.S.C. 3201(e)), a debtor who owns property which is subject to an outstanding judgment lien for a debt owed to the United States generally is not eligible to receive physical and economic injury disaster loans. The SBA Associate Administrator for Disaster Assistance, or designee, may waive this restriction as to disaster loans upon a demonstration of good cause. Good cause means a written representation by you under oath which convinces SBA that:

(1) The declared disaster was a major contributing factor to the delinquency which led to the judgment lien, regardless of when the original debt was incurred; or

(2) The disaster directly prevented you from fulfilling the terms of an agreement with SBA or any other Federal Government entity to satisfy its pre-disaster judgment lien; in this situation, the judgment creditor must certify to SBA that you were complying with the agreement to satisfy the judgment lien when the disaster occurred; or

(3) Other circumstances exist which would justify a waiver.

(b) The waiver determination by the Associate Administrator for Disaster Assistance, or designee, is a final, non-appealable decision. The granting of a waiver does not include loan approval; a waiver recipient must then follow normal loan application procedures.

§ 123.15 What if I change my mind?

If SBA required you to pledge collateral for your loan, you may change your mind and rescind your loan pursuant to the Consumer Credit Protection Act, 15 U.S.C. 1601, and Regulation Z of the Federal Reserve Board, 12 CFR part 226. Your note and any collateral documents signed by you will be canceled upon your return of all loan proceeds and your payment of any interest accrued.

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§ 123.16 How are loans administered and serviced?

(a) If you obtained your disaster loan from a participating lender, that lender is responsible for closing and servicing your loan. If you obtained your loan directly from SBA, your loan will be closed and serviced by SBA. The SBA rules on servicing are found in part 120 of this chapter.

(b) If you are unable to pay your SBA loan installments in a timely manner for reasons substantially beyond your control, you may request that SBA suspend your loan payments, extend your maturity, or both.

§ 123.17 Do other Federal requirements apply?

As a condition of disbursement, you must be in compliance with certain requirements relating to flood insurance, lead-based paint, earthquake hazards, coastal barrier islands, and child support obligations, as set forth in §§ 120.170 through 120.175 of this chapter.

§ 123.18 Can I request an increase in the amount of a physical disaster loan?

SBA will consider your request for an increase in your loan if you can show that the eligible cost of repair or replacement of damages increased because of events occurring after the loan approval that were beyond your control. An eligible cost is one which is related to the disaster for which SBA issued the original loan. For example, if you discover hidden damage within a reasonable time after SBA approved your original disaster loan and before repair, renovation, or reconstruction is complete, you may request an increase. Or, if applicable building code requirements were changed since SBA approved your original loan, you may request an increase in your loan amount.

[63 FR 15072, Mar. 30, 1998]

§ 123.19 May I request an increase in the amount of an economic injury loan?

SBA will consider your request for an increase in the loan amount if you can show that the increase is essential for your business to continue and is based on events occurring after SBA ap-

proved your original loan which were beyond your control. For example, delays may have occurred beyond your control which prevent you from resuming your normal business activity in a reasonable time frame. Your request for an increase in the loan amount must be related to the disaster for which the SBA economic injury disaster loan was originally made.

[63 FR 15072, Mar. 30, 1998]

§ 123.20 How long do I have to request an increase in the amount of a physical disaster loan or an economic injury loan?

You should request a loan increase as soon as possible after you discover the need for the increase, but not later than two years after SBA approved your physical disaster or economic injury loan. After two years, the SBA Associate Administrator for Disaster Assistance (AA/DA) may waive this limitation after finding extraordinary and unforeseeable circumstances.

[63 FR 15073, Mar. 30, 1998]

HOME DISASTER LOANS

§ 123.100 Am I eligible to apply for a home disaster loan?

(a) You are eligible to apply for a home disaster loan if you:

(1) Own and occupy your primary residence and have suffered a physical loss to your primary residence, personal property, or both; or

(2) Do not own your primary residence, but have suffered a physical loss to your personal property. Family members sharing a residence are eligible if they are not dependents of the owners of the residence.

(b) Losses may be claimed only by the owners of the property at the time of the disaster, and all such losses will be verified by SBA. SBA will consider beneficial ownership as well as legal title (for real or personal property) in determining who suffered the loss.

§ 123.101 When am I not eligible for a home disaster loan?

You are not eligible for a home disaster loan if:

(a) You have been convicted, during the past year, of a felony during and in connection with a riot or civil disorder or other declared disaster;

(b) You acquired voluntarily more than a 50 percent ownership interest in the damaged property after the disaster, and no contract of sale existed at the time of the disaster;

(c) Your damaged property can be repaired or replaced with the proceeds of insurance, gifts or other compensation, including condemnation awards (with one exception, these amounts must either be deducted from the amount of the claimed losses or, if received after SBA has approved and disbursed a loan, must be paid to SBA as principal payments on your loan. You must notify SBA of any such recoveries collected after receiving an SBA disaster loan (OMB Approval No. 3245–0124)). The one exception applies to amounts received under the Individual and Family Grant Program of the Federal Emergency Management Agency solely to meet an emergency need pending processing of an SBA loan. In such an event, you must repay the financial assistance with SBA loan proceeds if it was used for purposes also eligible for an SBA loan);

(d) SBA determines that you assumed the risk (for example, by not maintaining flood insurance as required by an earlier SBA disaster loan when the current loss is also due to flood);

(e) Your damaged property is a secondary home (although if you rented the property out before the disaster and the property would not constitute a “residence” under the provisions of Section 280A of the Internal Revenue Code (26 U.S.C. 280A), you may be eligible for a physical disaster business loan);

(f) Your damaged property is the type of vehicle normally used for recreational purposes, such as motorhomes, aircraft, and boats;

(g) Your damaged property consists of cash or securities;

(h) The replacement value of your damaged personal property is extraordinarily high and not easily verified, such as the value of antiques, artworks, or hobby collections;

(i) You or other principal owners of the damaged property are presently in-

carcerated, or on probation or parole following conviction for a serious criminal offense;

(j) Your only interest in the damaged property is in the form of a security interest, mortgage, or deed of trust;

(k) The damaged building, including contents, was newly constructed or substantially improved on or after February 9, 1989, and (without a significant business justification) is located seaward of mean high tide or entirely in or over water; or

(l) You voluntarily decide to relocate outside the business area in which the disaster has occurred, and there are no special or unusual circumstances leading to your decision (business area means the municipality which provides general governmental services to your damaged home or, if not located in a municipality, the county or equivalent political entity in which your damaged home is located).

§ 123.102 What circumstances would justify my relocating?

SBA may approve a loan if you intend to relocate outside the business area in which the disaster has occurred if your relocation is caused by such special or unusual circumstances as:

(a) Demonstrable risk that the business area will suffer future disasters;

(b) A change in employment status (such as loss of job, transfer, lack of adequate job opportunities within the business area or scheduled retirement within 18 months after the disaster occurs);

(c) Medical reasons; or

(d) Special family considerations which necessitate a move outside of the business area.

§ 123.103 What happens if I am forced to move from my home?

If you must relocate inside or outside the business area because local authorities will not allow you to repair your damaged property, SBA considers this to be a total loss and a mandatory relocation. In this case, your loan would be an amount that SBA considers sufficient to replace your residence at your new location, plus funds to cover losses of personal property and eligible refinancing.

§ 123.104 What interest rate will I pay on my home disaster loan?

If you can obtain credit elsewhere, your interest rate is set by a statutory formula, but will not exceed 8 percent per annum. If you cannot obtain credit elsewhere, your interest rate is one-half the statutory rate, but will not exceed 4 percent per annum. Credit elsewhere means that, with your cash flow and disposable assets, SBA believes you could obtain financing from non-federal sources on reasonable terms. If you cannot obtain credit elsewhere, you also may be able to borrow from SBA to refinance existing recorded liens against your damaged real property. Under prior legislation, some SBA disaster loans had split interest rates. On any such loan, repayments of principal are applied first to that portion of the loan with the lowest interest rate.

§ 123.105 How much can I borrow with a home disaster loan and what limits apply on use of funds and repayment terms?

(a) For all disasters occurring on or after October 26, 1993, there are limits on how much money you can borrow for particular purposes:

(1) \$40,000 for repair or replacement of household and personal effects;

(2) \$200,000 for repair or replacement of a primary residence (including upgrading in order to meet minimum standards of safety and decency or current building code requirements). Repair or replacement of landscaping and/or recreational facilities cannot exceed \$5,000;

(3) \$200,000 for eligible refinancing purposes; and

(4) 20 percent of the loan amount (not including refinancing) up to a maximum of \$48,000 for mitigation (see § 123.107).

(b) You may not use loan proceeds to repay any debts on personal property, secured or unsecured, unless you incurred those debts as a direct result of the disaster.

(c) SBA determines the loan maturity and repayment terms based on your needs and your ability to pay. Generally, you will pay equal monthly installments of principal and interest, beginning five months from the date of

the loan, as shown on the Note securing the loan. SBA will consider other payment terms if you have seasonal or fluctuating income, and SBA may allow installment payments of varying amounts over the first two years of the loan. The maximum maturity for a home disaster loan is 30 years. There is no penalty for prepayment of home disaster loans.

§ 123.106 What is eligible refinancing?

(a) If your home (primary residence) is totally destroyed or substantially damaged, and you do not have credit elsewhere, SBA may allow you to borrow money to refinance recorded liens or encumbrances on your home. Your home is totally destroyed or substantially damaged if it has suffered uninsured or otherwise uncompensated damage which, at the time of the disaster, is either:

(1) 40 percent or more of the home's market value or replacement cost at the time of the disaster, including land value, whichever is less; or

(2) 50 percent or more of its market value or replacement cost at the time of the disaster, not including land value, whichever is less.

(b) Your home disaster loan for refinancing existing liens or encumbrances cannot exceed an amount equal to the lesser of \$200,000, or the physical damage to your primary residence after reductions for any insurance or other recovery.

§ 123.107 What is mitigation?

Mitigation means specific measures taken by you to protect against recurring damage in similar future disasters. Examples include elevation of flood prone structures, retaining walls, sea walls, grading and contouring land, relocating utilities, and retrofitting and strengthening structures to protect against high winds, earthquake, flood, wildfire, or other natural hazards. The money that you can borrow for mitigation is limited to the lesser of the cost of mitigation, or 20 percent of your loan to repair or replace your damaged primary residence and personal property. SBA will not accept a request for a loan increase for mitigation filed after final disbursement of your original loan unless you can show

that your request was late because of substantial reasons beyond your control. Sections 123.400 through 123.407 address pre-disaster mitigation.

[61 FR 3304, Jan. 31, 1996, as amended at 64 FR 48276, Sept. 3, 1999]

PHYSICAL DISASTER BUSINESS LOANS

§ 123.200 Am I eligible to apply for a physical disaster business loan?

(a) Almost any business concern or charitable or other non-profit entity whose real or tangible personal property is damaged in a declared disaster area is eligible to apply for a physical disaster business loan. Your business may be a sole proprietorship, partnership, corporation, limited liability company, or other legal entity recognized under State law. Your business' size (average annual receipts or number of employees) is not taken into consideration in determining your eligibility for a physical disaster business loan. If your damaged business occupied rented space at the time of the disaster, and the terms of your business' lease require you to make repairs to your business' building, you may have suffered a physical loss and can apply for a physical business disaster loan to repair the property. In all other cases, the owner of the building is the eligible loan applicant.

(b) Damaged vehicles, of the type normally used for recreational purposes, such as motorhomes, aircraft, and boats, may be repaired or replaced with SBA loan proceeds if you can submit evidence that the damaged vehicles were used in your business at the time of the disaster.

§ 123.201 When am I not eligible to apply for a physical disaster business loan?

(a) You are not eligible for a physical disaster business loan if your business is an agricultural enterprise or if you (or any principal of the business) fit into any of the categories in § 123.101. Agricultural enterprise means a business primarily engaged in the production of food and fiber, ranching and raising of livestock, aquaculture and all other farming and agriculture-related industries.

(b) Sometimes a damaged business entity (whether in the form of a corporation, limited liability company, partnership, or sole proprietorship) is engaged in both agricultural enterprise and a non-agricultural business venture. If the agricultural enterprise part of your business entity has suffered a physical disaster, that enterprise is not eligible for SBA physical disaster assistance. If the non-agricultural business venture of your entity has suffered physical disaster damage, that part of your business operation would be eligible for SBA physical disaster assistance. If both the agricultural enterprise part and the non-agricultural business venture have incurred physical disaster damage, only the non-agricultural business venture of your business entity would be eligible for SBA physical disaster assistance.

(c) If your business is going to relocate voluntarily outside the business area in which the disaster occurred, you are not eligible for a physical disaster business loan. If, however, the relocation is due to uncontrollable or compelling circumstances, SBA will consider the relocation to be involuntary and eligible for a loan. Such circumstances may include, but are not limited to:

(1) The elimination or substantial decrease in the market for your products or services, as a consequence of the disaster;

(2) A change in the demographics of your business area within 18 months prior to the disaster, or as a result of the disaster, which makes it uneconomical to continue operations in your business area;

(3) A substantial change in your cost of doing business, as a result of the disaster, which makes the continuation of your business in the business area not economically viable;

(4) Location of your business in a hazardous area such as a special flood hazard area or an earthquake-prone area;

(5) A change in the public infrastructure in your business area which occurred within 18 months or as a result of the disaster that would result in substantially increased expenses for your business in the business area;

(6) Your implementation of decisions adopted and at least partially implemented within 18 months prior to the disaster to move your business out of the business area; and

(7) Other factors which undermine the economic viability of your business area.

(d) You are not eligible if your business is engaged in any illegal activity.

(e) You are not eligible if you are a government owned entity (except for a business owned or controlled by a Native American tribe).

(f) You are not eligible if your business presents live performances of a prurient sexual nature or derives directly or indirectly more than *de minimis* gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature.

[61 FR 3304, Jan. 31, 1996, as amended at 62 FR 35337, July 1, 1997; 63 FR 46644, Sept. 2, 1998]

§ 123.202 How much can my business borrow with a physical disaster business loan?

(a) Disaster business loans, including both physical disaster and economic injury loans to the same borrower, together with its affiliates, cannot exceed the lesser of the uncompensated physical loss and economic injury or \$1.5 million. Physical disaster loans may include amounts to meet current building code requirements. If your business is a major source of employment, SBA may waive the \$1.5 million limitation. A major source of employment is a business concern which has one or more locations in the disaster area which:

(1) Employed 10 percent or more of the entire work force within the commuting area of a geographically identifiable community (no larger than a county), provided that the commuting area does not extend more than 50 miles from such community; or

(2) Employed 5 percent of the work force in an industry within the disaster area and, if the concern is a non-manufacturing concern, employed no less than 50 employees in the disaster area, or if the concern is a manufacturing concern, employed no less than 150 employees in the disaster area; or

(3) Employed no less than 250 employees within the disaster area.

(b) SBA will consider waiving the \$1.5 million loan limit only if:

(1) Your damaged location or locations are out of business or in imminent danger of going out of business as a result of the disaster, and a loan in excess of \$1.5 million is necessary to reopen or keep open the damaged locations in order to avoid substantial unemployment in the disaster area; and

(2) You have used all reasonably available funds from your business, its affiliates and its principal owners (20% or greater ownership interest) and all available credit elsewhere (as described in §123.104) to alleviate your physical damage and economic injury.

(c) Physical disaster business borrowers may request refinancing of liens on both damaged real property and machinery and equipment, but for an amount reduced by insurance or other compensation. To do so, your business property must be totally destroyed or substantially damaged, which means:

(1) 40 percent or more of the aggregate value (lesser of market value or replacement cost at the time of the disaster) of the damaged real property (including land) and damaged machinery and equipment; or

(2) 50 percent or more of the aggregate value (lesser of market value or replacement cost at the time of the disaster) of the damaged real property (excluding land) and damaged machinery and equipment.

(d) Loan funds allocated for repair or replacement of landscaping or recreational facilities may not exceed \$5,000 unless the landscaping or recreational facilities fulfilled a functional need or contributed to the generation of business.

[61 FR 3304, Jan. 31, 1996, as amended at 63 FR 46644, Sept. 2, 1998]

§ 123.203 What interest rate will my business pay on a physical disaster business loan and what are the repayment terms?

(a) SBA will announce interest rates with each disaster declaration. If your business, together with its affiliates and principal owners, have credit elsewhere, your interest rate is set by a statutory formula, but will not exceed

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8 percent per annum. If you do not have credit elsewhere, your interest rate will not exceed 4 percent per annum. The maturity of your loan depends upon your repayment ability, but cannot exceed 3 years if you have credit elsewhere. Otherwise, the maximum maturity is 30 years.

(b) Generally, you must pay equal monthly installments, of principal and interest, beginning five months from the date of the loan as shown on the Note. SBA will consider other payment terms if you have seasonal or fluctuating income, and SBA may allow installment payments of varying amounts over the first two years of the loan. There is no penalty for prepayment for disaster loans.

ECONOMIC INJURY DISASTER LOANS

§ 123.300 Is my business eligible to apply for an economic injury disaster loan?

(a) If your business is located in a declared disaster area, and suffered substantial economic injury as a direct result of a declared disaster, you are eligible to apply for an economic injury disaster loan.

(1) Substantial economic injury is such that a business concern is unable to meet its obligations as they mature or to pay its ordinary and necessary operating expenses.

(2) Loss of anticipated profits or a drop in sales is not considered substantial economic injury for this purpose.

(b) Economic injury disaster loans are available only if you were a small business (as defined in part 121 of this chapter) when the declared disaster commenced, you and your affiliates and principal owners (20% or more ownership interest) have used all reasonably available funds, and you are unable to obtain credit elsewhere (see § 123.104).

(c) Eligible businesses do not include agricultural enterprises, but do include—

(1) Small nurseries affected by a drought disaster designated by the Secretary of Agriculture (nurseries are commercial establishments deriving 50 percent or more of their annual receipts from the production and sale of

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ornamental plants and other nursery products, including, but not limited to, bulbs, florist greens, foliage, flowers, flower and vegetable seeds, shrubbery, and sod);

(2) Small agricultural cooperatives; and

(3) Producer cooperatives.

§ 123.301 When would my business not be eligible to apply for an economic injury disaster loan?

Your business is not eligible for an economic disaster loan if you (or any principal of the business) fit into any of the categories in §§ 123.101 and 123.201, or if your business is:

(a) Engaged in lending, multi-level sales distribution, speculation, or investment (except for real estate investment with property held for rental when the disaster occurred);

(b) A non-profit or charitable concern;

(c) A consumer or marketing cooperative;

(d) Not a small business concern; or

(e) Deriving more than one-third of gross annual revenue from legal gambling activities;

(f) A loan packager which earns more than one-third of its gross annual revenue from packaging SBA loans;

(g) Principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular setting; or

(h) Primarily engaged in political or lobbying activities.

[61 FR 3304, Jan. 31, 1996, as amended at 63 FR 46644, Sept. 2, 1998]

§ 123.302 What is the interest rate on an economic injury disaster loan?

Your economic injury loan will have an interest rate of 4 percent per annum or less.

§ 123.303 How can my business spend my economic injury disaster loan?

(a) You can only use the loan proceeds for working capital necessary to carry your concern until resumption of normal operations and for expenditures necessary to alleviate the specific economic injury, but not to exceed that which the business could have provided had the injury not occurred.

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- (b) Loan proceeds may not be used to:
 - (1) Refinance indebtedness which you incurred prior to the disaster event;
 - (2) Make payments on loans owned by another federal agency (including SBA) or a Small Business Investment Company licensed under the Small Business Investment Act;
 - (3) Pay, directly or indirectly, any obligations resulting from a federal, state or local tax penalty as a result of negligence or fraud, or any non-tax criminal fine, civil fine, or penalty for non-compliance with a law, regulation, or order of a federal, state, regional, or local agency or similar matter;
 - (4) Repair physical damage; or
 - (5) Pay dividends or other disbursements to owners, partners, officers or stockholders, except for reasonable remuneration directly related to their performance of services for the business.

PRE-DISASTER MITIGATION LOANS

SOURCE: Sections 123.400 through 123.407 appear at 64 FR 48276, Sept. 3, 1999, unless otherwise noted.

§ 123.400 What is a pre-disaster mitigation loan?

Congress has authorized a pilot program for 5 fiscal years from 2000 through 2004 for SBA to make low interest, fixed rate loans to small businesses to use mitigation measures in support of Project Impact, a formal mitigation program established by the Federal Emergency Management Agency (FEMA).

§ 123.401 What types of mitigating measures are eligible for a pre-disaster mitigation loan?

Mitigation means specific measures taken by you to protect your real property or leasehold improvements from future disasters in Project Impact communities. If you are a landlord, the measures must be for protection of property leased primarily for commercial rather than residential purposes, to be determined on a comparative square footage basis. Additionally, SBA will consider providing a pre-disaster mitigation loan for relocation if your commercial real property is lo-

cated in a SFHA (Special Flood Hazard Area) and you relocate outside the SFHA but remain in the same Project Impact community. If the mitigation measures protect against a flood hazard, the applicant small business must be located in an existing structure in a SFHA. The local Project Impact coordinator will confirm that your proposed project is in accordance with specific Project Impact priorities and goals of that community. SBA will verify that the cost estimate is reasonable to accomplish each project to determine if the project is likely to accomplish the stated desired mitigation results. SBA verification and subsequent loan approval are not a guarantee that the project will prevent damages in future disasters.

§ 123.402 What businesses are eligible to apply for pre-disaster mitigation loans?

Each State, the District of Columbia, Puerto Rico, and the Virgin Islands have at least one FEMA Project Impact community. Only those small businesses located in Project Impact communities are eligible to apply for a pre-disaster mitigation loan. Your small business may be a sole proprietorship, partnership, corporation, limited liability company, or other legal entity recognized under State law. Your small business must have been in existence for at least one year prior to submitting an application for this loan. Your business (together with its affiliates) must be small (as defined in part 121 of this chapter) as of the date SBA accepts the application for processing, and SBA must also determine that the business, its affiliates and its owners do not have the financial resources to fund the mitigation measures without undue hardship.

§ 123.403 When would my business not be eligible to apply for a pre-disaster mitigation loan?

Your business is not eligible for a pre-disaster mitigation loan if it, together with its affiliates, fits into any of the categories in §§ 123.101, 123.201, and 123.301.

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§ 123.404 How much can my business borrow with a pre-disaster mitigation loan?

Each borrower, together with its affiliates, may borrow up to \$50,000 per year. SBA will fund approved loans in the order in which SBA accepted the application for processing. SBA will consider mitigation measures that cost more than \$50,000 per year if the business can identify sources that will fund the cost above \$50,000.

§ 123.405 What is the interest rate on a pre-disaster mitigation loan?

Your pre-disaster mitigation loan will have an interest rate of 4 percent per annum or less.

§ 123.406 How do I apply for a pre-disaster mitigation loan and which loans will be funded?

(a) At the beginning of each fiscal year commencing October 1st 1999, SBA will publish a declaration in the FEDERAL REGISTER announcing the availability of pre-disaster mitigation loans. The declaration will designate at least a 30 day application filing period in the first six months of the fiscal year, the application filing deadline, and the locations for obtaining and filing loan applications. Additional application periods may be announced each year depending on the availability of funds. In addition to the FEDERAL REGISTER, SBA will use FEMA and the local media to inform potential loan applicants where to obtain loan applications. SBA will not accept any applications after the announced deadline unless SBA reopens the application filing period.

(b) Complete an SBA pre-disaster mitigation loan application package which includes a written statement from the local Project Impact coordinator that the project is in accordance with the specific priorities and goals of the local community. The application must be filed during the announced filing period.

(c) An SBA Disaster Area Office will notify the Office of Disaster Assistance (ODA) when it has accepted a complete application for processing. The Area Office will approve, decline, or withdraw (stop processing) the application if the applicant does not give SBA re-

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quired information. The Area Office will notify ODA of its decision. ODA will then direct the Area Office to make the loan based on availability of loan funds and the date SBA accepted the complete application package.

§ 123.407 What happens if SBA denies or withdraws my pre-disaster mitigation loan application?

(a) If SBA denies your loan application, SBA will notify you in writing and give you the specific reasons for the denial. If you disagree with SBA's decision, you may respond under § 123.13. If SBA approves your application after reconsideration or appeal, SBA will use the date the Area Office received the request for reconsideration or appeal to determine the order of funding.

(b) If SBA withdraws your loan application and you later submit the missing information, and SBA approves the loan, SBA will use the date it reaccepts the application to determine the order of funding.

PART 124—8(A) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

Subpart A—8(a) Business Development

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AUTHORITY: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d) and Pub. L. 99-661, Pub. L. 100-656, sec. 1207, Pub. L. 101-37, Pub. L. 101-574, and 42 U.S.C. 9815.

Subpart A—8(a) Business Development

SOURCE: 63 FR 35739, June 30, 1998, unless otherwise noted.

§ 124.1 What is the purpose of the 8(a) Business Development program?

Sections 8(a) and 7(j) of the Small Business Act authorize a Minority Small Business and Capital Ownership Development program (designated the 8(a) Business Development or “8(a) BD” program for purposes of the regulations in this part). The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns compete in the American economy through business development.

§ 124.2 What length of time may a business participate in the 8(a) BD program?

A Participant receives a program term of nine years from the date of SBA's approval letter certifying the concern's admission to the program. The Participant must maintain its program eligibility during its tenure in the program and must inform SBA of any changes that would adversely affect its program eligibility. A firm that completes its nine year term of participation in the 8(a) BD program is deemed to graduate from the program. The nine year program term may be shortened only by termination, early graduation or voluntary graduation as provided for in this subpart.

§ 124.3 What definitions are important in the 8(a) BD program?

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation or ANC means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native

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Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*)

Bona fide place of business, for purposes of 8(a) construction procurements, means a location where a Participant regularly maintains an office which employs at least one full-time individual within the appropriate geographical boundary. The term does not include construction trailers or other temporary construction sites.

Community Development Corporation or CDC means a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, *et seq.*

Concern is defined in part 121 of this title.

Days means calendar days unless otherwise specified.

Day-to-day operations of a firm means the marketing, production, sales, and administrative functions of the firm.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, and mother-in-law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. *See* definition of “tribally-owned concern.”

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Negative control is defined in part 121 of this title.

Non-disadvantaged individual means any individual who does not claim disadvantaged status, does not qualify as disadvantaged, or upon whose dis-

advantaged status an applicant or Participant does not rely in qualifying for 8(a) BD program participation.

Participant means a small business concern admitted to participate in the 8(a) BD program.

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant. The SIC code designations are described in the Standard Industrial Classification Manual published by the U.S. Office of Management and Budget.

Principal place of business means the business location where the individuals who manage the concern’s day-to-day operations spend most working hours and where top management’s business records are kept. If the offices from which management is directed and where the business records are kept are in different locations, SBA will determine the principal place of business for program purposes.

Program year means a 12-month period of an 8(a) BD Participant’s program participation. The first program year begins on the date that the concern is certified to participate in the 8(a) BD program and ends one year later. Each subsequent program year begins on the Participant’s anniversary of program certification and runs for one 12-month period.

Same or similar line of business means business activities within the same two-digit “Major Group” of the SIC Manual as the primary industry classification of the applicant or Participant. The phrase “same business area” is synonymous with this definition.

Self-marketing of a requirement occurs when a Participant identifies a requirement that has not been committed to the 8(a) BD program and, through its marketing efforts, causes the procuring activity to offer that specific requirement to the 8(a) BD program on the Participant’s behalf. A firm which identifies and markets a requirement which is subsequently offered to the 8(a) BD program as an open requirement or on behalf of another Participant has not “self-marketed” the requirement within the meaning of this part.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

Unconditional ownership means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

ELIGIBILITY REQUIREMENTS FOR PARTICIPATION IN THE 8(A) BUSINESS DEVELOPMENT PROGRAM

§ 124.101 What are the basic requirements a concern must meet for the 8(a) BD program?

Generally, a concern meets the basic requirements for admission to the 8(a) BD program if it is a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States, and which demonstrates potential for success.

§ 124.102 What size business is eligible to participate in the 8(a) BD program?

(a) An applicant concern must qualify as a small business concern as defined in part 121 of this title. The applicable size standard is the one for its primary industry classification. The rules for calculating the size of a tribally-owned concern, a concern owned by an Alaska Native Corporation, a concern owned by a Native Hawaiian Organization, or a concern owned by a Community Development Corporation are additionally affected by §§ 124.109, 124.110, and 124.111, respectively.

(b) If 8(a) BD program officials determine that a concern may not qualify as small, they may deny an application for 8(a) BD program admission or may

request a formal size determination under part 121 of this title.

(c) A concern whose application is denied due to size by 8(a) BD program officials may request a formal size determination under part 121 of this title. A favorable determination will enable the firm to immediately submit a new 8(a) BD application without waiting one year.

§ 124.103 Who is socially disadvantaged?

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.

(b) *Members of designated groups.* (1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the birth country an individual's country of origin for purposes of being included within a designated group.

(2) An individual must demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it.

(3) The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for 8(a) BD (AA/8(a)BD) for consideration.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish individual social disadvantage by a preponderance of the evidence.

(2) Evidence of individual social disadvantage must include the following elements:

(i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(iii) Negative impact on entry into or advancement in the business world because of the disadvantage. SBA will consider any relevant evidence in assessing this element. In every case, however, SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(A) *Education.* SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(B) *Employment.* SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or

discriminatory behavior by an employer; and social patterns or pressures which have channelled the individual into nonprofessional or non-business fields.

(C) *Business history.* SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

(d) *Socially disadvantaged group inclusion.* (1) *General.* Representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon presentation of substantial evidence that members of the group have been subjected to racial or ethnic prejudice or cultural bias because of their identity as group members and without regard to their individual qualities, SBA will publish a notice in the FEDERAL REGISTER that it has received and is considering such a request, and that it will consider public comments.

(2) *Standards to be applied.* In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this section, SBA must determine that:

(i) The group has suffered prejudice, bias, or discriminatory practices;

(ii) Those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.

(3) *Procedure.* The notice published under paragraph (d)(1) of this section will authorize a specified period for the receipt of public comments supporting or opposing the petition for socially

disadvantaged group status. If appropriate, SBA may hold hearings. SBA may also conduct its own research relative to the group's petition.

(4) *Decision.* In making a final decision that a group should be considered presumptively disadvantaged, SBA must find that a preponderance of the evidence demonstrates that the group has met the standards set forth in paragraph (d)(2) of this section based on SBA's consideration of the group petition, the comments from the public, and any independent research it performs. SBA will advise the petitioners of its final decision in writing, and publish its conclusion as a notice in the FEDERAL REGISTER. If appropriate, SBA will amend paragraph (b)(1) of this section to include a new group.

§ 124.104 Who is economically disadvantaged?

(a) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(b) *Submission of narrative and financial information.* (1) Each individual claiming economic disadvantage must describe it in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(c) *Factors to be considered.* In considering diminished capital and credit opportunities, SBA will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. SBA will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry

classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that SBA compares include total assets, net sales, pre tax profit, sales/working capital ratio, and net worth.

(1) *Transfers within two years.* (i) Except as set forth in paragraph (c)(1)(ii) of this section, SBA will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the 8(a) BD program or within two years of a Participant's annual program review, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(ii) SBA will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(iii) In determining an individual's access to capital and credit, SBA may consider any assets that the individual transferred within such two-year period described by paragraph (c)(1)(i) of this section that SBA does not consider in evaluating the individual's assets and net worth (e.g., transfers to charities).

(2) *Net worth.* For initial 8(a) BD eligibility, the net worth of an individual claiming disadvantage must be less than \$250,000. For continued 8(a) BD eligibility after admission to the program, net worth must be less than \$750,000. In determining such net worth, SBA will exclude the ownership interest in the applicant or Participant and the equity in the primary personal residence (except any portion of such equity which is attributable to excessive

withdrawals from the applicant or Participant). Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(i) A contingent liability does not reduce an individual's net worth.

(ii) The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

§ 124.105 What does it mean to be unconditionally owned by one or more disadvantaged individuals?

An applicant or Participant must be at least 51 percent unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (CDCs). See § 124.3 for definition of unconditional ownership; and §§ 124.109, 124.110, and 124.111, respectively, for special ownership requirements for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, and CDCs.

(a) *Ownership must be direct.* Ownership by one or more disadvantaged individuals must be direct ownership. An applicant or Participant owned principally by another business entity or by a trust (including employee stock ownership trusts) that is in turn owned and controlled by one or more disadvantaged individuals does not meet this requirement. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a disadvantaged indi-

vidual where the trust is revocable, and the disadvantaged individual is the grantor, a trustee, and the sole current beneficiary of the trust.

(b) *Ownership of a partnership.* In the case of a concern which is a partnership, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged. The ownership must be reflected in the concern's partnership agreement.

(c) *Ownership of a limited liability company.* In the case of a concern which is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.

(d) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.

(e) *Stock options' effect on ownership.* In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by disadvantaged individuals. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-disadvantaged individuals will be treated as exercised, except for any ownership interests which are held by investment companies licensed under the Small Business Investment Act of 1958.

(f) *Dividends and distributions.* One or more disadvantaged individuals must be entitled to receive:

(1) At least 51 percent of the annual distribution of dividends paid on the stock of a corporate applicant concern;

(2) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation.

(g) *Ownership of another Participant.* The individuals determined to be disadvantaged for purposes of one Participant, their immediate family members, and the Participant itself, may not hold, in the aggregate, more than a 20 percent equity ownership interest in any other single Participant.

(h) *Ownership restrictions for non-disadvantaged individuals and concerns.* (1) A non-disadvantaged individual (in the aggregate with all immediate family members) or a non-Participant concern that is a general partner or stockholder with at least a 10 percent ownership interest in one Participant may not own more than a 10 percent interest in another Participant that is in the developmental stage or more than a 20 percent interest in another Participant in the transitional stage of the program. This restriction does not apply to financial institutions licensed or chartered by Federal, state or local government, including investment companies which are licensed under the Small Business Investment Act of 1958.

(2) A non-Participant concern in the same or similar line of business may not own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in a transitional stage of the program, except that a former Participant or a principal of a former Participant (except those that have been terminated from 8(a) BD program participation pursuant to §§124.303 and 124.304) may have an equity ownership interest of up to 20 percent in a current Participant in the developmental stage of the program or up to 30 percent in a transitional stage Participant, in the same or similar line of business.

(i) *Change of ownership.* A Participant may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. The decision to approve or deny a Participant's request for a change in ownership or business structure will be made and communicated to the firm by the AA/8(a)BD. The decision of the AA/8(a)BD is the final decision of the Agency. The AA/8(a)BD will issue a decision within 60 days from re-

ceipt of a request containing all necessary documentation, or as soon thereafter as possible. If 60 days lapse without a decision from SBA, the Participant cannot presume that it can complete the change without written approval from SBA. A decision to deny a request for change of ownership or business structure may be grounds for program termination where the change is made nevertheless.

(1) Any Participant that was awarded one or more 8(a) contracts may substitute one disadvantaged individual for another disadvantaged individual without requiring the termination of those contracts or a request for waiver under §124.515, as long as it receives SBA's approval prior to the change.

(2) Where the previous owner held less than a 10 percent interest in the concern, or the transfer results from the death or incapacity due to a serious, long-term illness or injury of a disadvantaged principal, prior approval is not required, but the concern must notify SBA within 60 days.

(3) Continued participation of the Participant with new ownership and the award of any new 8(a) contracts requires SBA's determination that all eligibility requirements are met by the concern and the new owners.

(4) Where a Participant requests a change of ownership or business structure, and proceeds with the change prior to receiving SBA approval (or where a change of ownership results from the death or incapacity of a disadvantaged individual for which a request prior to the change in ownership could not occur), SBA will suspend the Participant from program benefits pending resolution of the request. If the change is approved, the length of the suspension will be restored to the Participant's program term in the case of death or incapacity, or if the firm requested prior approval and waited 60 days for SBA approval.

(5) A change in ownership does not provide the new owner(s) with a new 8(a) BD program term. For example, if a concern has been in the 8(a) BD program for five years when a change in ownership occurs, the new owner will have four years remaining until program graduation.

(j) *Public offering.* A Participant's request for SBA's approval for the issuance of a public offering will be treated as a request for a change of ownership. Such request will cause SBA to examine the concern's continued need for access to the business development resources of the 8(a) BD program.

(k) *Community property laws given effect.* In determining ownership interests when an owner resides in any of the community property states or territories of the United States (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin), SBA considers applicable state community property laws. If only one spouse claims disadvantaged status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws. A transfer or relinquishment of interest by the non-disadvantaged spouse may be necessary in some cases to establish eligibility.

§ 124.106 When do disadvantaged individuals control an applicant or Participant?

Control is not the same as ownership, although both may reside in the same person. SBA regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or Participant's management and daily business operations must be conducted by one or more disadvantaged individuals, except for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, or Community Development Corporations (CDCs). (See §§124.109, 124.110, and 124.111, respectively, for the requirements for concerns owned by Indian tribes or ANCs, for concerns owned by Native Hawaiian Organizations, and for CDC-owned concerns.) Disadvantaged individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. A disadvantaged individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant if he or she can demonstrate

that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, where a critical license is held by a non-disadvantaged individual having an equity interest in the applicant or Participant firm, the non-disadvantaged individual may be found to control the firm.

(a)(1) An applicant or Participant must be managed on a full-time basis by one or more disadvantaged individuals who possess requisite management capabilities.

(2) A disadvantaged full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or Participant.

(3) One or more disadvantaged individuals who manage the applicant or Participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business. Work in a wholly-owned subsidiary of the applicant or participant may be considered to meet the requirement of full-time devotion. This applies only to a subsidiary owned by the 8(a) firm, and not to firms in which the disadvantaged individual has an ownership interest.

(4) Any disadvantaged manager who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the prior written approval of SBA. SBA will deny a request for outside employment which could conflict with the management of the firm or could hinder it in achieving the objectives of its business development plan.

(5) Except as provided in paragraph (d)(1) of this section, a disadvantaged owner's unexercised right to cause a change in the control or management of the applicant concern does not in itself constitute disadvantaged control and management, regardless of how quickly or easily the right could be exercised.

(b) In the case of a partnership, one or more disadvantaged individuals must serve as general partners, with control over all partnership decisions. A partnership in which no disadvantaged individual is a general partner will be ineligible for participation.

(c) In the case of a limited liability company, one or more disadvantaged individuals must serve as management members, with control over all decisions of the limited liability company.

(d) One or more disadvantaged individuals must control the Board of Directors of a corporate applicant or Participant.

(1) SBA will deem disadvantaged individuals to control the Board of Directors where:

(i) A single disadvantaged individual owns 100% of all voting stock of an applicant or Participant concern;

(ii) A single disadvantaged individual owns at least 51% of all voting stock of an applicant or Participant concern, the individual is on the Board of Directors and no super majority voting requirements exist for shareholders to approve corporation actions. Where super majority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the disadvantaged individual must own at least the percent of the voting stock needed to overcome any such super majority voting requirements; or

(iii) More than one disadvantaged shareholder seeks to qualify the concern (i.e., no one individual owns 51%), each such individual is on the Board of Directors, together they own at least 51% of all voting stock of the concern, no super majority voting requirements exist, and the disadvantaged shareholders can demonstrate that they have made enforceable arrangements to permit one of them to vote the stock of all as a block without a shareholder meeting. Where the concern has super majority voting requirements, the disadvantaged shareholders must own at least that percentage of voting stock needed to overcome any such super majority ownership requirements.

(2) Where an applicant or Participant does not meet the requirements set forth in paragraph (d)(1) of this section, the disadvantaged individual(s) upon whom eligibility is based must control the Board of Directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is disadvantaged and one is not, the dis-

advantaged vote must be weighted—worth more than one vote—in order for the concern to be eligible for 8(a) participation). Where a concern seeks to comply with this paragraph:

(i) Provisions for the establishment of a quorum cannot permit non-disadvantaged Directors to control the Board of Directors, directly or indirectly;

(ii) Any Executive Committee of Directors must be controlled by disadvantaged directors unless the Executive Committee can only make recommendations to and cannot independently exercise the authority of the Board of Directors.

(3) An applicant must inform SBA of any super majority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being admitted to the program, a Participant must inform SBA of changes regarding super majority voting requirements.

(4) Non-voting, advisory, or honorary Directors may be appointed without affecting disadvantaged individuals' control of the Board of Directors.

(5) Arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.

(e) Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability members, officers, and/or directors of the applicant or Participant. However, no such non-disadvantaged individual or immediate family member may:

(1) Exercise actual control or have the power to control the applicant or Participant;

(2) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or Participant, unless it is determined by the AA/8(a)BD that the relationship between the former employer or principal and the disadvantaged individual or applicant concern does not give the former employer actual control or the potential to control the applicant or Participant and such relationship is in the best interests of the 8(a) BD firm; or

(3) Receive compensation from the applicant or Participant in any form as directors, officers or employees, including dividends, that exceeds the compensation to be received by the highest officer (usually CEO or President). The highest ranking officer may elect to take a lower salary than a non-disadvantaged individual only upon demonstrating that it helps the applicant or Participant. In the case of a Participant, the Participant must also obtain the prior written consent of the AA/8(a)BD or designee before changing the compensation paid to the highest ranking officer to be below that paid to a non-disadvantaged individual.

(f) Non-disadvantaged individuals who transfer majority stock ownership or control of the firm to an immediate family member within two years prior to the application and remain involved in the firm as a stockholder, officer, director, or key employee of the firm are presumed to control the firm. The presumption may be rebutted by showing that the transferee has independent management experience necessary to control the operation of the firm.

(g) Non-disadvantaged individuals or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

(1) In circumstances where an applicant or Participant seeks to establish disadvantaged control of the Board of Directors through paragraph (d)(2) of this section, non-disadvantaged individuals control the Board of Directors of the applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.

(2) A non-disadvantaged individual or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or Participant which directly or indirectly allows the non-disadvantaged individual significantly to influence business decisions of the Participant.

(3) A non-disadvantaged individual or entity controls the applicant or Participant or an individual disadvantaged

owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-disadvantaged individual or entity the power to control a firm.

(4) Business relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or Participant cannot exercise independent business judgment without great economic risk.

§ 124.107 What is potential for success?

The applicant concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. To do so, it must be in business in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD application, unless a waiver for this requirement is granted pursuant to paragraph (b) of this section.

(a) Income tax returns for each of the two previous tax years must show operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification.

(b)(1) SBA may waive the two years in business requirement if each of the following five conditions are met:

(i) The individual or individuals upon whom eligibility is based have substantial business management experience;

(ii) The applicant has demonstrated technical experience to carry out its business plan with a substantial likelihood for success if admitted to the 8(a) BD program;

(iii) The applicant has adequate capital to sustain its operations and carry out its business plan as a Participant;

(iv) The applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category; and

(v) The applicant has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and any other requirements needed to perform contracts as a Participant.

(2) The concern seeking a waiver under paragraph (b) must provide information on governmental and non-governmental contracts in progress

and completed (including letters of reference) in order to establish successful contract performance, and must demonstrate how it otherwise meets the five conditions for waiver. SBA considers an applicant's performance on both government and private sector contracts in determining whether the firm has an overall successful performance record. If, however, the applicant has performed only government contracts or only private sector contracts, SBA will review its performance on those contracts alone to determine whether the applicant possesses a record of successful performance.

(c) In assessing potential for success, SBA considers the concern's access to credit and capital, including, but not limited to, access to long-term financing, access to working capital financing, equipment trade credit, access to raw materials and supplier trade credit, and bonding capability.

(d) In assessing potential for success, SBA will also consider the technical and managerial experience of the applicant concern's managers, the operating history of the concern, the concern's record of performance on previous Federal and private sector contracts in the primary industry in which the concern is seeking 8(a) BD certification, and its financial capacity. The applicant concern as a whole must demonstrate both technical knowledge in its primary industry category and management experience sufficient to run its day-to-day operations.

(e) The Participant or individuals employed by the Participant must hold all requisite licenses if the concern is engaged in an industry requiring professional licensing (e.g., public accountancy, law, professional engineering).

(f) An applicant will not be denied admission into the 8(a) BD program due solely to a determination that potential 8(a) contract opportunities are unavailable to assist in the development of the concern unless:

(1) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(2) The purchase of such products or services by the Federal Government will not be in quantities sufficient to

support the developmental needs of the applicant and other Participants providing the same or similar items or services.

§ 124.108 What other eligibility requirements apply for individuals or businesses?

(a) *Good character.* The applicant or Participant and all its principals must have good character.

(1) If, during the processing of an application, adverse information is obtained from the applicant or a credible source regarding possible criminal conduct by the applicant or any of its principals, no further action will be taken on the application until SBA's Inspector General has collected relevant information and has advised the AA/8(a)BD of his or her findings. The AA/8(a)BD will consider those findings when evaluating the application.

(2) Violations of any of SBA's regulations may result in denial of participation in the 8(a) BD program. The AA/8(a)BD will consider the nature and severity of the violation in making an eligibility determination.

(3) Debarred or suspended concerns or concerns owned by debarred or suspended persons are ineligible for admission to the 8(a) BD program.

(4) An applicant is ineligible for admission to the 8(a) BD program if the applicant concern or a proprietor, partner, limited liability member, director, officer, or holder of at least 10 percent of its stock, or another person (including key employees) with significant authority over the concern:

(i) Lacks business integrity as demonstrated by information related to an indictment or guilty plea, conviction, civil judgment, or settlement; or

(ii) Is currently incarcerated, or on parole or probation pursuant to a pretrial diversion or following conviction for a felony or any crime involving business integrity.

(5) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application. If, after

admission to the program, SBA discovers that false information has been knowingly submitted by a firm, SBA will initiate termination proceedings and suspend the firm under §§ 124.304 and 124.305. Whenever SBA determines that the applicant submitted false information, the matter will be referred to SBA's Office of Inspector General for review.

(b) *One-time eligibility.* Once a concern or disadvantaged individual upon whom eligibility was based has participated in the 8(a) BD program, neither the concern nor that individual will be eligible again.

(1) An individual who claims disadvantage and completes the appropriate SBA forms to qualify an applicant has participated in the 8(a) BD program if SBA approves the application.

(2) Use of eligibility will take effect on the date of the concern's approval for admission into the program.

(3) An individual who uses his or her one-time eligibility to qualify a concern for the 8(a) BD program will be considered a non-disadvantaged individual for ownership or control purposes of another applicant or Participant. The criteria restricting participation by non-disadvantaged individuals will apply to such an individual. See §§ 124.105 and 124.106.

(4) When at least 50% of the assets of a concern are the same as those of a former Participant, the concern will not be eligible for entry into the program.

(5) Participants which change their form of business organization and transfer their assets and liabilities to the new organization may do so without affecting the eligibility of the new organization provided the previous business is dissolved and all other eligibility criteria are met. In such a case, the new organization may complete the remaining program term of the previous organization. A request for a change in business form will be treated as a change of ownership under § 124.105(i).

(c) *Wholesalers.* An applicant concern seeking admission to the 8(a) BD program as a wholesaler need not demonstrate that it is capable of meeting the requirements of the nonmanufac-

turer rule for its primary industry classification.

(d) *Brokers.* Brokers are ineligible to participate in the 8(a) BD program. A broker is a concern that adds no material value to an item being supplied to a procuring activity or which does not take ownership or possession of or handle the item being procured with its own equipment or facilities.

(e) *Federal financial obligations.* Neither a firm nor any of its principals that fails to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing, is eligible for admission to or participation in the 8(a) BD program.

(f) *Achievement of benchmarks.* Where actual participation by disadvantaged businesses in a particular SIC Major Group exceeds the benchmark limitations established by the Department of Commerce, SBA, in its discretion, may decide not to accept an application for 8(a) BD participation from a concern whose primary industry classification falls within that Major Group.

[63 FR 35739, 35772, June 30, 1998]

§ 124.109 Do Indian tribes and Alaska Native Corporations have any special rules for applying to the 8(a) BD program?

(a) *Special rules for ANCs.* Small business concerns owned and controlled by ANCs are eligible for participation in the 8(a) program and must meet the eligibility criteria set forth in § 124.112 to the extent the criteria are not inconsistent with this section. ANC-owned concerns are subject to the same conditions that apply to tribally-owned concerns, as described in paragraphs (b) and (c) of this section, except that the following provisions and exceptions apply only to ANC-owned concerns:

(1) Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock. Settlement common stock means stock of an ANC issued pursuant to 43 U.S.C. 1606(g)(1), which is subject to the rights and restrictions listed in 43 U.S.C. 1606(h)(1).

(2) An ANC that meets the requirements set forth in paragraph (a)(1) of this section is deemed economically disadvantaged under 43 U.S.C. 1626(e), and need not establish economic disadvantage as required by paragraph (b)(2) of this section.

(3) Even though an ANC can be either for profit or non-profit, a small business concern owned and controlled by an ANC must be for profit to be eligible for the 8(a) program. The concern will be deemed owned and controlled by the ANC where both the majority of stock or other ownership interest and total voting power are held by the ANC and holders of its settlement common stock.

(4) The Alaska Native Claims Settlement Act provides that a concern which is majority owned by an ANC shall be deemed to be both owned and controlled by Alaska Natives and an economically disadvantaged business. Therefore, an individual responsible for control and management of an ANC-owned applicant or Participant need not establish personal social and economic disadvantage.

(5) Paragraphs (b)(3)(i), (ii) and (iv) of this section are not applicable to an ANC, provided its status as an ANC is clearly shown in its articles of incorporation.

(6) Paragraph (c)(1) of this section is not applicable to an ANC-owned concern to the extent it requires an express waiver of sovereign immunity or a “sue and be sued” clause.

(b) *Tribal eligibility.* In order to qualify a concern which it owns and controls for participation in the 8(a) BD program, an Indian tribe must establish its own economic disadvantaged status under paragraph (b)(2) of this section. Thereafter, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically required to do so by the AA/8(a)BD or designee. Each tribally-owned concern seeking to be certified for 8(a) BD participation must comply with the provisions of paragraph (c) of this section.

(1) *Social disadvantage.* An Indian tribe as defined in §124.3 is considered to be socially disadvantaged.

(2) *Economic disadvantage.* In order to be eligible to participate in the 8(a) BD program, the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This must involve the consideration of available data showing the tribe’s economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe’s access to capital.
- (vi) The tribal assets as disclosed in a current tribal financial statement. The statement must list all assets including those which are encumbered or held in trust, but the status of those encumbered or in trust must be clearly delineated.
- (vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises by serving as officers or directors.

(3) *Forms and documents required to be submitted.* Except as otherwise provided in this section, the Indian tribe generally must submit the forms and documents required of 8(a) BD applicants as well as the following material:

- (i) A copy of all governing documents such as the tribe’s constitution or business charter.
- (ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.
- (iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.
- (iv) Documents or materials needed to show the tribe’s economically disadvantaged status as described in paragraph (b)(2) of this section.

(c) *Business eligibility.* In order to be eligible to participate in the 8(a) BD program, a concern which is owned by an eligible Indian tribe (or wholly

owned business entities of such tribe) must meet the conditions set forth in paragraphs (c)(1) through (c)(7) of this section.

(1) *Legal business entity organized for profit and susceptible to suit.* The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. The concern's articles of incorporation, partnership agreement or limited liability company articles of organization must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

(2) *Size.* (i) A tribally-owned applicant concern must qualify as a small business concern as defined for purposes of Federal Government procurement in part 121 of this title. The particular size standard to be applied is based on the primary industry classification of the applicant concern.

(ii) A tribally-owned Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.

(iii) In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(3) *Ownership.* (i) For corporate entities, a tribe must own at least 51 per-

cent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a tribe must own at least a 51 percent interest.

(ii) A tribe cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary SIC code as the applicant. A tribe may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the tribe operates in the 8(a) BD program as its primary SIC code.

(iii) The restrictions of § 124.105(h) do not apply to tribes; they do, however, apply to non-disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.

(4) *Control and management.* (i) The management and daily business operations of a tribally-owned concern must be controlled by the tribe, through one or more disadvantaged individual members who possess sufficient management experience of an extent and complexity needed to run the concern, or through management as follows:

(A) Management may be provided by committees, teams, or Boards of Directors which are controlled by one or more members of an economically disadvantaged tribe, or

(B) Management may be provided by non-tribal members if SBA determines that such management is required to assist the concern's development, that the tribe will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how disadvantaged tribal members will develop managerial skills sufficient to manage the concern or similar tribally-owned concerns in the future.

(ii) Members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict

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with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

(5) *Individual eligibility limitation.* SBA does not deem an individual involved in the management or daily business operations of a tribally-owned concern to have used his or her individual eligibility within the meaning of § 124.108(b).

(6) *Potential for success.* (i) A tribally-owned applicant concern must be in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, or demonstrate potential for success as set forth in paragraph (c)(6)(ii) of this section.

(ii) In determining whether a tribally-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:

(A) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operation of the concern;

(B) The financial capacity of the concern; and

(C) The concern's record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

(7) *Other eligibility criteria.* (i) As with other 8(a) applicants, a tribally-owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless:

(A) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(B) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other program partici-

pants providing the same or similar items or services.

(ii) Except for the tribe itself, the concern's officers, directors, and all shareholders owning an interest of 20% or more must demonstrate good character. See § 124.108(a).

§ 124.110 Do Native Hawaiian Organizations have any special rules for applying to the 8(a) BD program?

(a) Concerns owned by economically disadvantaged Native Hawaiian Organizations, as defined in § 124.3, are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in §§ 124.101 through 124.108 and § 124.112 to the extent that they are not inconsistent with this section.

(b) A concern owned by a Native Hawaiian Organization must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the Native Hawaiian Organization or any other business enterprise owned by the Native Hawaiian Organization, unless the Administrator determines that one or more such concerns owned by the Native Hawaiian Organization have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(c) A Native Hawaiian Organization cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary SIC code as the applicant. A Native Hawaiian Organization may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the Native Hawaiian Organization operates in the 8(a) BD program as its primary SIC code.

(d) SBA does not deem an individual involved in the management or daily business operations of a Participant

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owned by a Native Hawaiian Organization to have used his or her individual eligibility within the meaning of § 124.108(b).

(e)(1) An applicant concern owned by a Native Hawaiian Organization must be in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, or demonstrate potential for success as set forth in paragraph (e)(2) of this section.

(2) In determining whether a concern owned by a Native Hawaiian Organization has the potential for success, SBA will look at a number of factors including, but not limited to:

(i) The technical and managerial experience and competence of the individual(s) who will manage and control the daily operation of the concern.

(ii) The financial capacity of the concern; and

(iii) The concern's record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

§ 124.111 Do Community Development Corporations (CDCs) have any special rules for applying to the 8(a) BD program?

(a) Concerns owned at least 51 percent by CDCs (or a wholly owned business entity of a CDC) are eligible for participation in the 8(a) BD program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. These concerns must meet all eligibility criteria set forth in § 124.101 through § 124.108 and § 124.112 to the extent that they are not inconsistent with this section.

(b) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) is considered to be controlled by such CDC and eligible for participation in the 8(a) BD program, provided it meets all eligibility criteria set forth or referred to in this section and its management and daily business operations are conducted by one or more individuals determined to have managerial experi-

ence of an extent and complexity needed to run the concern.

(c) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the CDC or any other business enterprise owned by the CDC, unless the Administrator determines that one or more such concerns owned by the CDC have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(d) A CDC cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary SIC code as the applicant. A CDC may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the CDC operates in the 8(a) BD program as its primary SIC code.

(e) SBA does not deem an individual involved in the management or daily business operations of a CDC-owned concern to have used his or her individual eligibility within the meaning of § 124.108(b).

(f)(1) A CDC-owned applicant concern must be in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, or demonstrate potential for success as set forth in paragraph (e)(2) of this section.

(2) In determining whether a CDC-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:

(i) The technical and managerial experience and competence of the individual(s) who will manage and control the daily operation of the concern;

(ii) The financial capacity of the concern; and

(iii) The concern's record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

(g) A CDC-owned applicant and all of its principals must have good character as set forth in § 124.108(a).

§ 124.112 What criteria must a business meet to remain eligible to participate in the 8(a) BD program?

(a) *Standards.* In order for a concern (except those owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs) to remain eligible for 8(a) BD program participation, it must continue to meet all eligibility criteria contained in § 124.101 through § 124.108. For concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs to remain eligible, they must meet the criteria set forth in this § 124.112 to the extent that they are not inconsistent with § 124.109, § 124.110 and § 124.111, respectively. The concern must inform SBA in writing of any changes in circumstances which would adversely affect its program eligibility, especially economic disadvantage and ownership and control. Any concern that fails to meet the eligibility requirements after being admitted to the program will be subject to termination or early graduation under §§ 124.302 through 124.304, as appropriate.

(b) *Submissions supporting continued eligibility.* As part of an annual review, each Participant must annually submit to the servicing district office the following:

(1) A certification that it meets the 8(a) BD program eligibility requirements as set forth in § 124.101 through § 124.108 and paragraph (a) of this section;

(2) A certification that there have been no changed circumstances which could adversely affect the Participant's program eligibility. If the Participant is unable to provide such certification, the Participant must inform SBA of any changes and provide relevant supporting documentation.

(3) Personal financial information for each disadvantaged owner;

(4) A record from each individual claiming disadvantaged status regarding the transfer of assets for less than

fair market value to any immediate family member, or to a trust any beneficiary of which is an immediate family member, within two years of the date of the annual review. The record must provide the name of the recipient(s) and family relationship, and the difference between the fair market value of the asset transferred and the value received by the disadvantaged individual.

(5) A record of all payments, compensation, and distributions (including loans, advances, salaries and dividends) made by the Participant to each of its owners, officers or directors, or to any person or entity affiliated with such individuals;

(6) If it is an approved protege, a narrative report detailing the contacts it has had with its mentor and benefits it has received from the mentor/protege relationship. See § 124.520(b)(4) for additional annual requirements;

(7) IRS Form 4506, Request for Copy or Transcript of Tax Form; and

(8) Such other information as SBA may deem necessary. For other required annual submissions, see §§ 124.601 through 124.603.

(c) *Eligibility reviews.* (1) Upon receipt of specific and credible information alleging that a Participant no longer meets the eligibility requirements for continued program eligibility, SBA will review the concern's eligibility for continued participation in the program.

(2) Sufficient reasons for SBA to conclude that a socially disadvantaged individual is no longer economically disadvantaged include, but are not limited to, excessive withdrawals of funds or other assets withdrawn from the concern by its owners, or substantial personal assets, income or net worth of any disadvantaged owner. SBA may also consider access by the Participant firm to a significant new source of capital or loans since the financial condition of the Participant is considered in evaluating the disadvantaged individual's economic status.

(d) *Excessive withdrawals.* (1) The term withdrawal includes, but is not limited to, the following: officer's salary; cash dividends; distributions in excess of amounts needed to pay S Corporation taxes; cash and property withdrawals;

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bonuses; loans; advances; payments to immediate family members; investments on behalf of an owner, officer, or key employee; acquisition of a business not merged with the 8(a) Participant; charitable contributions; and speculative ventures.

(2) If SBA determines that excessive funds or other assets have been withdrawn from the Participant, SBA may:

(i) Initiate termination proceedings under §§124.303 and 124.304 where the withdrawals detrimentally affect the achievement of the Participant's targets, objectives and goals set forth in its business plan, or its overall business development;

(ii) Initiate early graduation proceedings under §§124.302 and 124.303 where the withdrawals do not adversely affect the Participant's business development; or

(iii) Require an appropriate reinvestment of funds or other assets, as well as any other actions SBA deems necessary to counteract the detrimental effects of the withdrawals, as a condition of the Participant maintaining program eligibility.

(3) Withdrawals are excessive if during any fiscal year of the Participant they exceed (i) \$150,000 for firms with sales up to \$1,000,000; (ii) \$200,000 for firms with sales between \$1,000,000 and \$2,000,000; and (iii) \$300,000 for firms with sales over \$2,000,000.

(4) The fact that a concern's net worth has increased despite withdrawals that are deemed excessive will not preclude SBA from determining that such withdrawals were detrimental to the attainment of the concern's business objectives or to its overall business development.

APPLYING TO THE 8(a) BD PROGRAM

§ 124.201 May any business submit an application?

Any concern or any individual on behalf of a business has the right to apply for 8(a) BD program participation whether or not there is an appearance of eligibility.

§ 124.202 Where must an application be filed?

An application for 8(a) BD program admission must be filed in the SBA Division of Program Certification and Eligibility (DPCE) field office serving the territory in which the principal place of business is located. The SBA district office will provide an applicant concern with information regarding the 8(a) BD program and with all required application forms.

§ 124.203 What must a concern submit to apply to the 8(a) BD program?

Each 8(a) BD applicant concern must submit those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments will include, but not be limited to, financial statements, Federal personal and business tax returns, and personal history statements. An applicant must also submit IRS Form 4506, Request for Copy or Transcript of Tax Form, to SBA. The application package may be in the form of an electronic application.

§ 124.204 How does SBA process applications for 8(a) BD program admission?

(a) The AA/8(a)BD is authorized to approve or decline applications for admission to the 8(a) BD program. The appropriate DPCE field office will receive, review and evaluate all 8(a) BD applications except those from ANC-owned applicants. SBA's Anchorage District Office will receive all applications from ANC-owned applicants and review them for completeness before sending them to the AA/8(a)BD for further processing. The appropriate field office will advise each program applicant within 15 days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will process an application for 8(a) BD program participation within 90 days of receipt of a complete application package by the DPCE field office. Incomplete application packages will not be processed.

(b) SBA, in its sole discretion, may request clarification of information contained in the application at any

time in the application process. SBA will take into account any clarifications made by an applicant in response to a request for such by SBA.

(c) An applicant concern's eligibility will be based on circumstances existing on the date of application, except where clarification is made pursuant to paragraph (b) of this section or as provided in paragraph (d) of this section.

(d) Changed circumstances for an applicant concern occurring subsequent to its application and which adversely affect eligibility will be considered and may constitute grounds for decline. The applicant must inform SBA of any changed circumstances that could adversely affect its eligibility for the program (particularly economic disadvantage and ownership and control) during its application review. Failure to inform SBA of any such changed circumstances constitutes good cause for which SBA may terminate the Participant if non-compliance is discovered after admittance.

(e) The decision of the AA/8(a)BD to approve or deny an application will be in writing. A decision to deny admission will state the specific reasons for denial, and will inform the applicant of any appeal rights.

(f) If the AA/8(a)BD approves the application, the date of the approval letter is the date of program certification for purposes of determining the concern's program term.

§ 124.205 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?

(a) An applicant may request the AA/8(a)BD to reconsider his or her initial decline decision by filing a request for reconsideration with the SBA field office that originally processed its application. Filing means submission by personal delivery, first-class mail, express mail, facsimile transmission followed by first-class mail, or commercial delivery service. The applicant must submit its request for reconsideration within 45 days of receiving notice that its application was declined. The applicant must provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline.

(b) The AA/8(a)BD will issue a written decision within 45 days of the regional DPCE's receipt of the applicant's request. The AA/8(a)BD may either approve the application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the AA/8(a)BD will explain why the applicant is not eligible for admission to the 8(a) BD program and give specific reasons for the decline.

(c) If the AA/8(a)BD declines the application solely on issues not raised in the initial decline, the applicant can ask for reconsideration as if it were an initial decline.

§ 124.206 What appeal rights are available to an applicant that has been denied admission?

(a) An applicant may appeal a denial of program admission to SBA's Office of Hearings and Appeals (OHA), if it is based solely on a negative finding of social disadvantage, economic disadvantage, ownership, control, or any combination of these four criteria. A denial decision that is based at least in part on the failure to meet any other eligibility criterion is not appealable and is the final decision of SBA.

(b) The applicant may appeal an initial decision of the AA/8(a)BD without requesting reconsideration, or may appeal the decision of the AA/8(a)BD on reconsideration.

(c) The applicant may initiate an appeal by filing a petition in accordance with part 134 of this title with OHA within 45 days of the date of service (as defined in §134.204) of the Agency decision.

(d) If an appeal is filed with OHA, the written decision of the Administrative Law Judge is the final Agency decision. If an appealable decision is not appealed, the decision of the AA/8(a)BD is the final Agency decision.

§ 124.207 Can an applicant reapply for admission to the 8(a) BD program?

A concern which has been declined for 8(a) BD program admission may submit a new application for admission to the program 12 months after the date of the final Agency decision to decline.

EXITING THE 8(a) BD PROGRAM

§ 124.301 What are the ways a business may leave the 8(a) BD program?

A concern participating in the 8(a) BD program may leave the program by any of the following means:

- (a) Graduation upon the expiration of the program term established pursuant to § 124.2;
- (b) Voluntary early graduation;
- (c) Early graduation pursuant to the provisions of §§ 124.302 and 124.304; or
- (d) Termination pursuant to the provisions of §§ 124.303 and 124.304.

§ 124.302 What is early graduation?

(a) *General.* SBA may graduate a firm from the 8(a) BD program prior to the expiration of its Program Term where SBA determines that:

(1) The concern has successfully completed the 8(a) BD program by substantially achieving the targets, objectives, and goals set forth in its business plan prior to the expiration of its program term, and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program; or

(2) One or more of the disadvantaged owners upon whom the Participant's eligibility is based are no longer economically disadvantaged.

(b) *Criteria for determining whether a Participant has met its goals and objectives.* In determining whether a Participant has substantially achieved the targets, objectives and goals of its business plan and in assessing the overall competitive strength and viability of a Participant, SBA considers the totality of circumstances, including the following factors:

- (1) Degree of sustained profitability;
- (2) Sales trends, including improved ratio of non-8(a) sales to 8(a) sales since program entry;
- (3) Business net worth, financial ratios, working capital, capitalization, and access to credit and capital;
- (4) Current ability to obtain bonding;
- (5) A comparison of the Participant's business and financial profiles with profiles of non-8(a) BD businesses having the same primary four-digit SIC code as the Participant;

(6) Strength of management experience, capability, and expertise; and

(7) Ability to operate successfully without 8(a) contracts.

(c) *Excessive withdrawals.* SBA may graduate a Participant prior to the expiration of its program term where excessive funds or other assets have been withdrawn from the Participant (see § 124.112(d)(3)), causing SBA to determine that the Participant has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program.

(d) *Benchmark achievement.* SBA may graduate a Participant prior to the expiration of its program term where the Participant has substantially achieved the targets, objectives and goals of its business plan as adjusted under § 124.403(d) and its primary industry classification falls within a SIC Major Group in which the benchmarks described in § 124.403(d) have been achieved.

[63 FR 35739, 35772, June 30, 1998]

§ 124.303 What is termination?

(a) SBA may terminate the participation of a concern in the 8(a) BD program prior to the expiration of the concern's Program Term for good cause. Examples of good cause include, but are not limited to, the following:

(1) Submission of false information in the concern's 8(a) BD application, regardless of whether correct information would have caused the concern to be denied admission to the program, and regardless of whether correct information was given to SBA in accompanying documents or by other means.

(2) Failure by the concern to maintain its eligibility for program participation.

(3) Failure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals.

(4) Failure by the concern to obtain prior written approval from SBA for any changes in ownership or business structure, management or control pursuant to §§ 124.105 and 124.106.

(5) Failure by the concern to disclose to SBA the extent to which non-disadvantaged persons or firms participate in the management of the Participant business concern.

(6) Failure by the concern or one or more of the concern's principals to maintain good character.

(7) A pattern of failure to make required submissions or responses to SBA in a timely manner, including a failure to provide required financial statements, requested tax returns, reports, updated business plans, information requested by SBA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

(8) Cessation of business operations by the concern.

(9) Failure by the concern to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability.

(10) A pattern of inadequate performance by the concern of awarded section 8(a) contracts.

(11) Failure by the concern to pay or repay significant financial obligations owed to the Federal Government.

(12) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business.

(13) Excessive withdrawals, including transfers of funds or other business assets, from the concern for the personal benefit of any of its owners or any person or entity affiliated with the owners that hinder the development of the concern (see § 124.112(d)).

(14) Unauthorized use of SBA direct or guaranteed loan proceeds or violation of an SBA loan agreement.

(15) Submission by or on behalf of a Participant of false information to SBA, including false certification of compliance with non-8(a) business activity targets under § 124.507 or failure to report changes that adversely affect the program eligibility of an applicant or program participant under § 124.204 and § 124.112, where responsible officials of the 8(a) BD Participant knew or

should have known the submission to be false.

(16) Debarment, suspension, voluntary exclusion, or ineligibility of the concern or its principals pursuant to part 145 of this title or FAR subpart 9.4 (48 CFR part 9, subpart 9.4).

(17) Conduct by the concern, or any of its principals, indicating a lack of business integrity. Such conduct may be demonstrated by information related to a criminal indictment or guilty plea, a criminal conviction, or a judgment or settlement in a civil case.

(18) Willful failure by the Participant business concern to comply with applicable labor standards and obligations.

(19) Material breach of any terms and conditions of the 8(a) BD Program Participation Agreement.

(20) Willful violation by a concern, or any of its principals, of any SBA regulation pertaining to material issues.

(b) The examples of good cause listed in paragraph (a) of this section are intended to be illustrative only. Other grounds for terminating a Participant from the 8(a) BD program for cause may exist and may be used by SBA.

§ 124.304 What are the procedures for early graduation and termination?

(a) *General.* The same procedures apply to both early graduation and termination of Participants from the 8(a) BD program.

(b) *Letter of Intent to Terminate or Graduate Early.* When SBA believes that a Participant should be terminated or graduated prior to the expiration of its program term, SBA will notify the concern in writing. The Letter of Intent to Terminate or Graduate Early will set forth the specific facts and reasons for SBA's findings, and will notify the concern that it has 30 days from the date of service (as defined in § 134.204 of this title) of the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify termination or early graduation. Service is defined in § 134.204.

(c) *Recommendation and decision.* Following the 30-day response period, the Assistant Administrator for DPCE (AA/DPCE) or designee will consider the proposed early graduation or termination and any information submitted

in response by the concern. Upon determining that early graduation or termination is not warranted, the AA/DPCE or designee will notify the Participant in writing. If early graduation or termination appears warranted, the AA/DPCE will make such a recommendation to the AA/8(a)BD, who will then make a decision whether to early graduate or terminate the concern. SBA will act in a timely manner in processing early graduation and termination actions.

(d) *Notice requirements.* Upon deciding that early graduation or termination is warranted, the AA/8(a)BD will issue a Notice of Early Graduation or Termination. The Notice will set forth the specific facts and reasons for the decision, and will advise the concern that it may appeal the decision in accordance with the provisions of part 134 of this title.

(e) *Appeal to OHA.* Procedures governing appeals of early graduation or termination to SBA's OHA are set forth in part 134. If a Participant does not appeal a Notification of Early Graduation or Termination within 45 days of the date of service (as defined in §134.204), the decision of the AA/8(a)BD is the final agency decision effective on the date the appeal right expired.

(f) *Effect of early graduation or termination.* After the effective date of early graduation or termination, a Participant is no longer eligible to receive any 8(a) BD program assistance. However, such concern is obligated to complete previously awarded 8(a) contracts, including any priced options which may be exercised.

§ 124.305 What is suspension and how is a Participant suspended from the 8(a) BD program?

(a) At any time after SBA issues a Letter of Intent to Terminate pursuant to § 124.304, the AA/8(a)BD may suspend 8(a) contract support and all other forms of 8(a) BD program assistance to that concern until the issue of the concern's termination from the program is finally decided. The AA/8(a)BD may suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government, such as where informa-

tion showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists, including where the concern or one of its principals submitted false statements to the Federal Government. SBA will suspend a Participant where SBA determines that the Participant submitted false information in its 8(a) BD application.

(b) SBA will issue a Notice of Suspension to the Participant's last known address by certified mail, return receipt requested. Suspension is effective as of the date of the issuance of the Notice. The Notice will provide the following information:

(1) The basis for the suspension;

(2) A statement that the suspension will continue pending the completion of further investigation, a final program termination determination, or some other specified period of time;

(3) A statement that awards of competitive and non-competitive 8(a) contracts, including those which have been "self-marketed" by a Participant, will not be made during the pendency of the suspension unless it is determined by the head of the relevant procuring agency or an authorized representative to be in the best interest of the Government to do so, and SBA adopts that determination;

(4) A statement that the concern is obligated to complete previously awarded section 8(a) contracts;

(5) A statement that the suspension is effective nationally throughout SBA;

(6) A statement that a request for a hearing on the suspension will be considered by an Administrative Law Judge at OHA, and granted or denied as a matter of discretion.

(7) A statement that the firm's participation in the program is suspended effective on the date the Notice is served, and that the program term will resume only if the suspension is lifted or the firm is not terminated.

(c) The applicant concern may appeal a Notice of Suspension by filing a petition in accordance with part 134 of this title with OHA within 45 days of the date of service (as defined in §134.204) of a Notice of Suspension pursuant to paragraph (b) of this section. It is contemplated that in most cases a hearing on the issue of the suspension will be

afforded if the Participant requests one, but authority to grant a hearing is within the discretion of the Administrative Law Judge in OHA. A suspension remains in effect pending the result of its appeal.

(d) SBA has the burden of showing that adequate evidence exists that protection of the Federal Government's interest requires suspension before OHA or the AA/8(a)BD makes a final determination regarding the termination action.

(1) The term "adequate evidence" means information contained in the record before the AA/8(a)BD at the time of his or her suspension decision that is sufficient to support the reasonable belief that the Government's interests need to be protected.

(2) SBA need not demonstrate that an act or omission actually occurred in order for OHA to uphold a suspension. SBA's burden in a suspension proceeding is limited to demonstrating that it had a reasonable belief that a particular act or omission occurred, and that that act or omission requires suspension to protect the interests of the Government.

(3) Unless the Administrative Law Judge consolidates the suspension and termination proceedings, OHA's review is limited to determining whether the Government's interests need to be protected, and will not consider the merits of the termination action.

(e) If there is a timely appeal, the decision of the Administrative Law Judge is the final SBA decision. If there is not a timely appeal, the decision of the AA/8(a)BD is the final Agency decision.

(f) Upon the request of SBA, OHA may consolidate suspension and termination proceedings when the issues presented are identical.

(g) Any program suspension which occurs under this section is effective until such time as SBA lifts the suspension or the Participant's participation in the program is fully terminated. If the concern is ultimately not terminated from the 8(a) BD program, the suspension will be lifted and the length of the suspension will be added to the concern's program term.

(h) SBA may suspend a Participant from program benefits where a change of ownership or business structure has

been requested if ownership or control of the participant changed prior to SBA's approval pending resolution of the request to change its ownership or control. If the change of ownership is approved, the length of the suspension will be added to the firm's program term where the change in ownership results from the death or incapacity of a disadvantaged individual or where the firm requested prior approval and waited 60 days for SBA approval before making the change. The suspension will be commenced by the issuance of a notice similar to that required for termination-related suspensions under paragraph (b) of this section, except that a change of ownership suspension is not appealable.

(i) SBA does not recognize the concept of de facto suspension. Adding time to the end of a Participant's program term equal to the length of a suspension will occur only where a concern's program participation has been formally suspended in accordance with the procedures set forth in this section.

(j) A suspension from 8(a) BD participation under this section has no effect on a concern's eligibility for non-8(a) Federal Government contracts. However, a debarment or suspension under the Federal Acquisition Regulation (48 CFR, chapter 1) will disqualify a concern from receiving all Federal Government contracts, including 8(a) contracts.

BUSINESS DEVELOPMENT

§ 124.401 Which SBA field office serves a Participant?

The SBA district office which serves the geographical territory where a Participant's principal place of business is located normally will service the concern during its participation in the 8(a) BD program.

§ 124.402 How does a Participant develop a business plan?

(a) *General.* In order to assist the SBA servicing office in determining the business development needs of its portfolio Participants, each Participant must develop a comprehensive business plan setting forth its business targets, objectives, and goals.

Small Business Administration

§ 124.404

(b) *Submission of initial business plan.* Each Participant must submit a business plan to its SBA servicing office as soon as possible after program admission. The Participant will not be eligible for 8(a) BD program benefits, including 8(a) contracts, until SBA approves its business plan.

(c) *Contents of business plan.* The business plan must contain at least the following:

(1) A detailed description of any products currently being produced and any services currently being performed by the concern, as well as any future plans to enter into one or more new markets;

(2) The applicant's designation of its primary industry classification, as defined in § 124.3;

(3) An analysis of market potential, competitive environment, and the concern's prospects for profitable operations during and after its participation in the 8(a) BD program;

(4) An analysis of the concern's strengths and weaknesses, with particular attention on ways to correct any financial, managerial, technical, or work force conditions which could impede the concern from receiving and performing non-8(a) contracts;

(5) Specific targets, objectives, and goals for the business development of the concern during the next two years;

(6) Estimates of both 8(a) and non-8(a) contract awards that will be needed to meet its targets, objectives and goals; and

(7) Such other information as SBA may require.

§ 124.403 How is a business plan updated and modified?

(a) *Annual review.* Each Participant must annually review its business plan with its assigned Business Opportunity Specialist (BOS), and modify the plan as appropriate. The Participant must submit a modified plan and updated information to its BOS within thirty (30) days after the close of each program year. It also must submit a capability statement describing its current contract performance capabilities as part of its updated business plan.

(b) *Contract forecast.* As part of the annual review of its business plan, each Participant must annually forecast in writing its needs for contract awards

for the next program year. The forecast must include:

(1) The aggregate dollar value of 8(a) contracts to be sought, broken down by sole source and competitive opportunities where possible;

(2) The aggregate dollar value of non-8(a) contracts to be sought;

(3) The types of contract opportunities to be sought, identified by product or service; and

(4) Such other information as SBA may request to aid in providing effective business development assistance to the Participant.

(c) *Transition management strategy.* Beginning in the first year of the transitional stage of program participation, each Participant must annually submit a transition management strategy to be incorporated into its business plan. The transition management strategy must describe:

(1) How the Participant intends to meet the applicable non-8(a) business activity target imposed by § 124.507 during the transitional stage of participation; and

(2) The specific steps the Participant intends to take to continue its business growth and promote profitable business operations after the expiration of its program term.

(d) *Benchmark achievement.* Where actual participation by disadvantaged businesses in a particular SIC Major Group exceeds the benchmark limitations established by the Department of Commerce for that Major Group, SBA may adjust the targets, objectives and goals contained in the business plans of Participants whose primary industry classification falls within that Major Group. Any adjustment will take into account projected decreases in 8(a) and SDB contracting opportunities.

[63 FR 35739, 35772, June 30, 1998]

§ 124.404 What business development assistance is available to Participants during the two stages of participation in the 8(a) BD program?

(a) *General.* Participation in the 8(a) BD program is divided into two stages, a developmental stage and a transitional stage. The developmental stage will last four years, and the transitional stage will last five years, unless the concern has exited the program by

one of the means set forth in §124.301 prior to the expiration of its program term.

(b) *Developmental stage of program participation.* A Participant, if otherwise eligible, may receive the following assistance during the developmental stage of program participation:

- (1) Sole source and competitive 8(a) contract support;
- (2) Financial assistance pursuant to §120.375 of this title;
- (3) The transfer of technology or surplus property owned by the United States pursuant to §124.405; and
- (4) Training to aid in developing business principles and strategies to enhance their ability to compete successfully for both 8(a) and non-8(a) contracts.

(c) *Transitional stage of program participation.* A Participant, if otherwise eligible, may receive the following assistance during the transitional stage of program participation:

- (1) The same assistance as that provided to Participants in the developmental stage;
- (2) Assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the concern and other Participants or other business concerns with respect to contracting opportunities outside the 8(a) BD program for research, development, or full scale engineering or production of major systems (these arrangements must comply with all relevant statutes and regulations, including applicable size standard requirements); and
- (3) Training and technical assistance in transitional business planning.

§124.405 How does a Participant obtain Federal Government surplus property?

(a) *General.* (1) Pursuant to 15 U.S.C. 636(j)(13)(F), eligible Participants may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR Part 101-44 and this section will be used to transfer surplus property to eligible Participants.

(2) The property which may be transferred to SASPs for further transfer to eligible Participants includes all per-

sonal property which has been determined to be “donable” as defined in 41 CFR 101-44.001-3.

(b) *Eligibility to receive Federal surplus property.* To be eligible to receive Federal surplus property, on the date of transfer a concern must:

- (1) Be in the 8(a) BD program;
- (2) Be in compliance with all program requirements, including any reporting requirements;
- (3) Not be debarred, suspended, or declared ineligible under part 9, subpart 9.4 of the Federal Acquisition Regulations, Title 48 of the Code of Federal Regulations;
- (4) Not be under a pending 8(a) BD program suspension, termination or early graduation proceeding; and
- (5) Be engaged or expect to be engaged in business activities making the item useful to it.

(c) *Use of acquired surplus property.* (1) Eligible Participants may acquire surplus Federal property from any SASP located in any state, provided the concern represents and agrees in writing:

- (i) As to what the intended use of the surplus property is to be and that this use is consistent with the objectives of the concern’s 8(a) business plan;
- (ii) That it will use the property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;
- (iii) That it will not sell or transfer the property to be acquired to any party other than the Federal Government during its term of participation in the 8(a) program and for one year after it leaves the program;
- (iv) That, at its own expense, it will return the property to a SASP or transfer it to another Participant if directed to do so by SBA because it has not used the property as intended within one year of receipt;

(v) That, should it breach its agreement not to sell or transfer the property, it will be liable to the Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and

(vi) That it will give SBA access to inspect the property and all records pertaining to it.

(2) A firm receiving surplus property pursuant to this section assumes all liability associated with or stemming from the use of the property.

(3) If the property is not placed in use for the purposes for which it was intended within one year of its receipt, SBA may direct the concern to deliver the property to another Participant or to the SASP from which it was acquired.

(4) Failure to comply with any of the commitments made under paragraph (c)(1) of this section constitutes a basis for termination from the 8(a) program.

(d) *Procedures for acquiring Federal Government surplus property.* (1) Participants may participate in the surplus property distribution program administered by the SASPs to the same extent, but with no special priority over, other authorized transferees. See 41 CFR subpart 101-44.2.

(2) Each Participant seeking to acquire Federal Government surplus property from a SASP must:

(i) Certify in writing to the SASP that it is eligible to receive the property pursuant to paragraph (b) of this section;

(ii) Make the written representations and agreement required by paragraph (c)(1) of this section; and

(iii) Identify to the SASP its servicing SBA field office.

(3) Upon receipt of the required certification, representations, agreement, and information set forth in paragraph (d)(2) of this section, the SASP must contact the appropriate SBA field office and obtain SBA's verification that the concern seeking to acquire the surplus property is eligible, and that the identified use of the property is consistent with the concern's business activities. SASPs may not release property to a Participant without this verification.

(4) The SASP and the Participant must agree on and record the fair market value of the surplus property at the time of the transfer to the Participant. The SASP must provide to SBA a written record, including the agreed upon fair market value, of each transaction to a Participant when any property has been transferred.

(e) *Costs.* Participants acquiring surplus property from a SASP must pay a

service fee to the SASP which is equal to the SASP's direct costs of locating, inspecting, and transporting the surplus property. If a Participant elects to incur the responsibility and the expense for transporting the acquired property, the concern may do so and no transportation costs will be charged by the SASP. In addition, the SASP may charge a reasonable fee to cover its costs of administering the program. In no instance will any SASP charge a Participant more for any service than their established fees charged to other transferees.

(f) *Title.* The title to surplus property acquired from a SASP will pass to the Participant when the Participant executes the applicable SASP distribution documents and takes possession of the property.

(g) *Compliance.* (1) SBA will periodically review whether Participants that have received surplus property have used and maintained the property as agreed. This review may include site visits to visually inspect the property to ensure that it is being used in a manner consistent with the terms of its transfer.

(2) Participants must provide SBA with access to all relevant records upon request.

(3) Where SBA receives credible information that transferred surplus property may have been disposed of or otherwise used in a manner that is not consistent with the terms of the transfer, SBA may investigate such claim to determine its validity.

(4) SBA may take any action to correct any noncompliance involving the use of transferred property still in possession of the Participant or to enforce any terms, conditions, reservations, or restrictions imposed on the property by the distribution document. Actions to enforce compliance, or which may be taken as a result of noncompliance, include the following:

(i) Requiring that the property be placed in proper use within a specified time;

(ii) Requiring that the property be transferred to another Participant having a need and use for the property, returned to the SASP serving the area where the property is located for distribution to another eligible transferee

or to another SASP, or transferred through GSA to another Federal agency;

(iii) Recovery of the fair rental value of the property from the date of its receipt by the Participant; and

(iv) Initiation of proceedings to terminate the Participant from the 8(a) BD program.

(5) Where SBA finds that a recipient has sold or otherwise disposed of the acquired surplus property in violation of the agreement covering sale and disposal, the Participant is liable for the agreed upon fair market value of the property at the time of the transfer, or the sale price, whichever is greater. However, a Participant need not repay any amount where it can demonstrate to SBA's satisfaction that the property is no longer useful for the purpose for which it was transferred and receives SBA's prior written consent to transfer the property. For example, if a piece of equipment breaks down beyond repair, it may be disposed of without being subject to the repayment provision, so long as the concern receives SBA's prior consent.

(6) Any funds received by SBA in enforcement of this section will be remitted promptly to the Treasury of the United States as miscellaneous receipts.

CONTRACTUAL ASSISTANCE

§ 124.501 What general provisions apply to the award of 8(a) contracts?

(a) Pursuant to section 8(a) of the Small Business Act, SBA is authorized to enter into all types of contracts with other Federal agencies, including contracts to furnish equipment, supplies, services, leased real property, or materials to them or to perform construction work for them, and to contract the performance of these contracts to qualified Participants. Where practicable, simplified acquisition procedures should be used for 8(a) contracts at or below the simplified acquisition threshold. Where appropriate, SBA will delegate the contract execution function to procuring activities.

In order to receive and retain a delegation of SBA's contract execution and review functions, a procuring activity must report all 8(a) contract awards, modifications, and options to SBA.

(b) 8(a) contracts may either be sole source awards or awards won through competition with other Participants.

(c) Admission into the 8(a) BD program does not guarantee that a Participant will receive 8(a) contracts.

(d) A requirement for possible award may be identified by SBA, a particular Participant or the procuring activity itself. SBA will submit the capability statements provided to SBA annually under § 124.403 to appropriate procuring activities for the purpose of matching requirements with Participants.

(e) Participants should market their capabilities to appropriate procuring activities to increase their prospects of receiving sole source 8(a) contracts.

(f) An 8(a) participant that identifies a requirement that appears suitable for award through the 8(a) BD program may request SBA to contact the procuring activity to request that the requirement be offered to the 8(a) BD program.

(g) A concern must be a current Participant in the 8(a) BD program at the time of award, except as provided in § 124.507(d).

(h) A Participant must certify that it is a small business under the size standard corresponding to the SIC code assigned to each 8(a) contract. 8(a) BD program personnel will verify size prior to award of an 8(a) contract. If the Participant is not verified as small, it may request a formal size determination from the appropriate General Contracting Area Office under part 121 of this title.

(i) Any person or entity that misrepresents its status as a "small business concern owned and controlled by socially and economically disadvantaged individuals" in order to obtain any 8(a) contracting opportunity will be subject to possible criminal, civil and administrative penalties, including those imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d).

§ 124.502 How does an agency offer a procurement to SBA for award through the 8(a) BD program?

(a) A procuring activity contracting officer indicates his or her formal intent to award a procurement requirement as an 8(a) contract by submitting a written offering letter to SBA. The procuring activity may transmit the offering letter to SBA by electronic mail, if available, or by facsimile transmission, as well as by mail or commercial delivery service.

(b) Contracting officers must submit offering letters to the following locations:

(1) For competitive 8(a) requirements and those sole source requirements for which no specific Participant is nominated (i.e., open requirements) other than construction requirements, to the SBA district office serving the geographical area in which the procuring activity is located;

(2) For competitive and open construction requirements, to the SBA district office serving the geographical area in which the work is to be performed or, in the case of such contracts to be performed overseas, to the Office of 8(a) BD located in SBA Headquarters;

(3) For sole source requirements offered on behalf of a specific Participant, to the SBA district office servicing that concern.

(c) An offering letter must contain the following information:

(1) A description of the work to be performed;

(2) The estimated period of performance;

(3) The SIC code that applies to the principal nature of the acquisition;

(4) The anticipated dollar value of the requirement, including options, if any;

(5) Any special restrictions or geographical limitations on the requirement;

(6) The location of the work to be performed for construction procurements;

(7) Any special capabilities or disciplines needed for contract performance;

(8) The type of contract to be awarded, such as firm fixed price, cost reimbursement, or time and materials;

(9) The acquisition history, if any, of the requirement;

(10) The names and addresses of any small business contractors which have performed on this requirement during the previous 24 months;

(11) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business set-aside, or as a small disadvantaged business set-aside if applicable, and that no other public communication (such as a notice in the Commerce Business Daily) has been made showing the procuring activity's clear intent to use any of these means of procurement;

(12) Identification of any specific Participant that the procuring activity contracting officer nominates for award of a sole source 8(a) contract, if appropriate, including a brief justification for the nomination, such as one of the following:

(i) The Participant, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) BD program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated concern is the incumbent;

(13) Bonding requirements, if applicable;

(14) Identification of all Participants which have expressed an interest in being considered for the acquisition;

(15) Identification of all SBA field offices which have requested that the requirement be awarded through the 8(a) BD program;

(16) A request, if appropriate, that a requirement whose estimated contract value is under the applicable competitive threshold be awarded as an 8(a) competitive contract; and

(17) Any other information that the procuring activity deems relevant or which SBA requests.

§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?

(a) *Acceptance of the requirement.* Upon receipt of the procuring activity's offer of a procurement requirement, SBA will determine whether it will accept the requirement for the 8(a) BD program. SBA's decision whether to accept the requirement will be sent to

the procuring activity in writing within 10 working days of receipt of the written offering letter if the contract is valued at more than the simplified acquisition threshold, and within two days of receipt of the offering letter if the contract is valued at or below the simplified acquisition threshold, unless SBA requests, and the procuring activity grants, an extension. SBA is not required to accept any particular procurement offered to the 8(a) BD program.

(1) Where SBA decides to accept an offering of a sole source 8(a) procurement, SBA will accept the offer both on behalf of the 8(a) BD program and in support of a specific Participant.

(2) Where SBA decides to accept an offering of a competitive 8(a) procurement, SBA will accept the offer on behalf of the 8(a) BD program.

(3) Where SBA has delegated its contract execution functions to a procuring activity, the procuring activity may assume that SBA accepts its offer for the 8(a) program if the procuring activity does not receive a reply to its offer within five days.

(4) In the case of procurement requirements valued at or below the Simplified Acquisition Procedures threshold:

(i) Where a procuring activity makes an offer to the 8(a) program on behalf of a specific Program Participant and does not receive a reply to its offer within two days, the procuring activity may assume the offer is accepted and proceed with award of an 8(a) contract;

(ii) Where SBA has delegated its 8(a) contract execution functions to an agency, SBA may authorize the procuring activity to award an 8(a) contract without requiring an offer and acceptance of the requirement for the 8(a) program. In such a case, the procuring activity must notify SBA of all 8(a) awards made under this authority.

(5) Where SBA does not respond to an offering letter within the normal 10-day time period, the procuring activity may seek SBA's acceptance through the AA/8(a)BD. The procuring activity may assume that SBA accepts its offer for the 8(a) program if it does not receive a reply from the AA/8(a)BD within 5 days of his or her receipt of the procuring activity request.

(b) *Verification of SIC code.* As part of the acceptance process, SBA will verify the appropriateness of the SIC code designation assigned to the requirement by the procuring activity contracting officer.

(1) SBA will accept the SIC code assigned to the requirement by the procuring activity contracting officer as long as it is reasonable, even though other SIC codes may also be reasonable.

(2) If SBA and the procuring activity are unable to agree as to the proper SIC code designation for the requirement, SBA may either refuse to accept the requirement for the 8(a) BD program, appeal the contracting officer's determination to the head of the agency pursuant to §124.505, or appeal the SIC code designation to OHA under part 134 of this title.

(c) *Sole source award where procuring activity nominates a specific Participant.* SBA will determine whether an appropriate match exists where the procuring activity identifies a particular Participant for a sole source award.

(1) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the Participant recommended by the procuring activity, provided that:

(i) The procurement is consistent with the Participant's business plan;

(ii) The Participant complies with its applicable non-8(a) business activity target imposed by §124.509(d);

(iii) The Participant is small for the size standard corresponding to the SIC code assigned to the requirement by the procuring activity contracting officer; and

(iv) The Participant has submitted required financial statements to SBA.

(2) If an appropriate match exists, SBA will advise the procuring activity whether SBA will participate in contract negotiations or whether SBA will authorize the procuring activity to negotiate directly with the identified Participant. Where SBA has delegated its contract execution functions to a procuring activity, SBA will also identify that delegation in its acceptance letter.

(3) If an appropriate match does not exist, SBA will notify the Participant

and the procuring activity, and may then nominate an alternate Participant.

(d) *Open requirements.* When a procuring activity does not nominate a particular concern for performance of a sole source 8(a) contract (open requirement), the following additional procedures will apply:

(1) If the procurement is a construction requirement, SBA will examine the portfolio of Participants that have a bona fide place of business within the geographical boundaries served by the SBA district office where the work is to be performed to select a qualified Participant. If none is found to be qualified or a match for a concern in that district is determined to be impossible or inappropriate, SBA may nominate a Participant with a bona fide place of business within the geographical boundaries served by another district office within the same state, or may nominate a Participant having a bona fide place of business out of state but within a reasonable proximity to the work site. SBA's decision will ensure that the nominated Participant is close enough to the work site to keep costs of performance reasonable.

(2) If the procurement is not a construction requirement, SBA may select any eligible, responsible Participant nationally to perform the contract.

(3) In cases in which SBA selects a Participant for possible award from among two or more eligible and qualified Participants, the selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, technical capability, and whether award will promote the equitable distribution of 8(a) contracts.

(e) *Formal technical evaluations.* Except for requirements for architectural and engineering services, SBA will not authorize formal technical evaluations for sole source 8(a) requirements. A procuring activity:

(1) Must request that a procurement be a competitive 8(a) award if it requires formal technical evaluations of more than one Participant for a requirement below the applicable competitive threshold amount; and

(2) May conduct informal assessments of several Participants' capabilities to perform a specific requirement, so long as the statement of work for the requirement is not released to any of the Participants being assessed.

(f) *Repetitive acquisitions.* A procuring activity contracting officer must submit a new offering letter to SBA where he or she intends to award a follow-on or repetitive contract as an 8(a) award. This enables SBA to determine:

(1) Whether the requirement should be a competitive 8(a) award;

(2) A nominated firm's eligibility, whether or not it is the same firm that performed the previous contract;

(3) The affect that contract award would have on the equitable distribution of 8(a) contracts; and

(4) Whether the requirement should continue under the 8(a) BD program.

(g) *Basic Ordering Agreements (BOAs).* A Basic Ordering Agreement (BOA) is not a contract under the FAR. See 48 CFR 16.703(a). Each order to be issued under the BOA is an individual contract. As such, the procuring activity must offer, and SBA must accept, each task order under a BOA in addition to offering and accepting the BOA itself.

(1) SBA will not accept for award on a sole source basis any task order under a BOA that would cause the total dollar amount of task orders issued to exceed the applicable competitive threshold amount set forth in § 124.506(a).

(2) Where a procuring activity believes that task orders to be issued under a proposed BOA will exceed the applicable competitive threshold amount set forth in § 124.506(a), the procuring activity must offer the requirement to the program to be competed among eligible Participants.

(3) Once a concern's program term expires, the concern otherwise exits the 8(a) BD program, or becomes other than small for the SIC code assigned under the BOA, new orders will not be accepted for the concern.

(h) *Multiple Award and Federal Supply Schedule Contracts.* Unlike Basic Ordering Agreements, Multiple Award and Federal Supply Schedule contracts are contracts. Orders issued under these contracts are not considered separate contracts. As such, SBA's acceptance

of the original Multiple Award or Federal Supply Schedule contract is valid for the duration of the contract. Separate offers and acceptances will not be made for individual task orders under these contracts.

(1) Task orders are not required to be competed where the value of the task order will exceed the competitive threshold as long as the original contract was competed.

(2) A concern may continue to accept new orders under a Multiple Award or Federal Supply Schedule contract even where a concern's program term expires, the concern otherwise exits the 8(a) BD program, or the concern becomes other than small for the SIC code assigned under the contract subsequent to award of the contract.

(i) Requirements where SBA has delegated contract execution authority. Except as provided in paragraph (a)(4)(i) of this section, where SBA has delegated its 8(a) contract execution authority to the procuring activity, the procuring activity must still offer and SBA must still accept all requirements intended to be awarded as 8(a) contracts.

§ 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract?

SBA will not accept a procurement for award as an 8(a) contract if the circumstances identified in paragraphs (a) through (d) of this section exist.

(a) *Reservation as small business or SDB set-aside.* The procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a small business or small disadvantaged business (SDB) set-aside prior to offering the requirement to SBA for award as an 8(a) contract. The AA/8(a)BD may permit the acceptance of the requirement, however, under extraordinary circumstances.

Example to paragraph (a). SBA may accept a requirement where a procuring activity made a decision to offer the requirement to the 8(a) BD program before the solicitation was sent out and the procuring activity acknowledges and documents that the solicitation was in error.

(b) *Competition prior to offer and acceptance.* The procuring activity com-

peted a requirement among Participants prior to offering the requirement to SBA and receiving SBA's formal acceptance of the requirement.

(1) Any competition conducted without first obtaining SBA's formal acceptance of the procurement for the 8(a) BD program will not be considered an 8(a) competitive requirement.

(2) SBA may accept the requirement for the 8(a) BD program as a competitive 8(a) requirement, but only if the procuring activity agrees to resolicit the requirement using appropriate competitive 8(a) procedures.

(c) *Adverse impact.* SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs. The adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) BD program, and does not apply to follow-on or renewal 8(a) acquisitions. SBA will not consider adverse impact with respect to any requirement offered to the 8(a) program under Simplified Acquisition Procedures.

(1) In determining whether the acceptance of a requirement would have an adverse impact on an individual small business, SBA will consider all relevant factors.

(i) In connection with a specific small business, SBA presumes adverse impact to exist where:

(A) The small business concern has performed the specific requirement for at least 24 months;

(B) The small business is performing the requirement at the time it is offered to the 8(a) BD program, or its performance of the requirement ended within 30 days of the procuring activity's offer of the requirement to the 8(a) BD program; and

(C) The dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates). For a multi-year requirement, the dollar value of the last 12 months of the requirement will be used to determine whether a

small business would be adversely affected by SBA's acceptance.

(ii) Except as provided in paragraph (c)(2) of this section, adverse impact does not apply to "new" requirements. A new requirement is one which has not been previously procured by the relevant procuring activity.

(A) Where a requirement is new, no small business could have previously performed the requirement and, thus, SBA's acceptance of the requirement for the 8(a) BD program will not adversely impact any small business.

(B) Construction contracts, by their very nature (e.g., the building of a specific structure), are deemed new requirements.

(C) The expansion or modification of an existing requirement will be considered a new requirement where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work.

(D) SBA need not perform an impact determination where a new requirement is offered to the 8(a) BD program.

(2) In determining whether the acceptance of a requirement would have an adverse impact on a group of small businesses, SBA will consider the effects of combining or consolidating various requirements being performed by two or more small business concerns into a single contract which would be considered a "new" requirement as compared to any of the previous smaller requirements. SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption set forth in paragraph (c)(1)(i) of this section.

(3) In determining whether the acceptance of a requirement would have an adverse impact on other small business programs, SBA will consider all relevant factors, including but not limited to, the number and value of contracts in the subject industry reserved for the 8(a) BD program as compared with other small business programs.

(d) *Benchmark achievement.* Where actual participation by disadvantaged businesses in a SIC Major Group exceeds the benchmark limitations established by the Department of Commerce for that Major Group, SBA may elect

not to accept a requirement having a SIC code within the Major Group that is offered to SBA for award as an 8(a) contract. In determining whether to accept a requirement in such a case, SBA will consider the developmental needs of Participants and other anticipated contracting opportunities available to them.

(e) *Release for non-8(a) competition.* In limited instances, SBA may decline to accept the offer of a follow-on or renewal 8(a) acquisition to give a concern previously awarded the contract that is leaving or has left the 8(a) BD program the opportunity to compete for the requirement outside the 8(a) BD program.

(1) SBA will consider release only where:

(i) The procurement awarded through the 8(a) BD program is being or was performed by either a Participant whose program term will expire prior to contract completion, or, by a former Participant whose program term expired within one year of the date of the offering letter;

(ii) The concern requests in writing that SBA decline to accept the offer prior to SBA's acceptance of the requirement for award as an 8(a) contract; and

(iii) The concern qualifies as a small business for the requirement now offered to the 8(a) BD program.

(2) In considering release, SBA will balance the importance of the requirement to the concern's business development needs against the business development needs of other Participants that are qualified to perform the requirement. This determination will include consideration of whether rejection of the requirement would seriously reduce the pool of similar types of contracts available for award as 8(a) contracts. SBA will seek the views of the procuring activity.

(3) If SBA declines to accept the offer and releases the requirement, it will recommend to the procuring activity that the requirement be procured as a small business or, if authorized, an SDB set-aside.

[63 FR 35739, 35772, June 30, 1998]

§ 124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to reserve a requirement for the 8(a) BD program?

(a) *What SBA may appeal.* The Administrator of SBA may appeal the following matters to the head of the procuring agency:

(1) A contracting officer's decision not to make a particular procurement available for award as an 8(a) contract;

(2) A contracting officer's decision to reject a specific Participant for award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) BD program; and

(3) The terms and conditions of a proposed 8(a) contract, including the procuring activity's SIC code designation and estimate of the fair market price.

(b) *Procedures for appeal.* (1) SBA must notify the contracting officer of the SBA Administrator's intent to appeal an adverse decision within 5 working days of SBA's receipt of the decision.

(2) Upon receipt of the notice of intent to appeal, the procuring activity must suspend further action regarding the procurement until the head of the procuring agency issues a written decision on the appeal, unless the head of the procuring agency makes a written determination that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for a consideration of the appeal.

(3) The SBA Administrator must send a written appeal of the adverse decision to the head of the procuring agency within 15 working days of SBA's notification of intent to appeal or the appeal may be considered withdrawn.

(4) By statute (15 U.S.C. 637(a)(1)(A)), the procuring agency head must specify in writing the reasons for a denial of an appeal brought by the Administrator under this section.

§ 124.506 At what dollar threshold must an 8(a) procurement be competed among eligible Participants?

(a) *Competitive thresholds.* (1) A procurement offered and accepted for the 8(a) BD program must be competed among eligible Participants if:

(i) There is a reasonable expectation that at least two eligible Participants will submit offers at a fair market price;

(ii) The anticipated award price of the contract, including options, will exceed \$5,000,000 for contracts assigned manufacturing SIC codes and \$3,000,000 for all other contracts; and

(iii) The requirement has not been accepted by SBA for award as a sole source 8(a) procurement on behalf of a tribally-owned or ANC-owned concern.

(2) For all types of contracts, the applicable competitive threshold amounts will be applied to the procuring activity estimate of the total value of the contract, including all options. For indefinite delivery or indefinite quantity type contracts, the thresholds are applied to the maximum order amount authorized.

(3) Where the estimate of the total value of a proposed 8(a) contract is less than the applicable competitive threshold amount and the requirement is accepted as a sole source requirement on that basis, award may be made even though the contract price arrived at through negotiations exceeds the competitive threshold, provided that the contract price is not more than ten percent greater than the competitive threshold amount.

Example to paragraph (a)(3). If the anticipated award price for a professional services requirement is determined to be \$2.7 million and it is accepted as a sole source 8(a) requirement on that basis, a sole source award will be valid even if the contract price arrived at after negotiation is \$3.1 million.

(4) A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount may not be divided into several separate procurement actions for lesser amounts in order to use 8(a) sole source procedures to award to a single contractor.

(b) *Exemption from competitive thresholds for Participants owned by Indian tribes.* SBA may award a sole source 8(a) contract to a Participant concern owned and controlled by an Indian tribe or an ANC where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement

into the 8(a) BD program as a competitive procurement. There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a tribally-owned or ANC-owned concern, but a procurement may not be removed from competition to award it to a tribally-owned or ANC-owned concern on a sole source basis.

(c) *Competition below thresholds.* The AA/8(a)BD, on a nondelegable basis, may approve a request from a procuring activity to compete a requirement that is below the applicable competitive threshold amount among eligible Participants.

(1) This authority will be used primarily when technical competitions are appropriate or when a large number of potential awardees exist.

(2) The AA/8(a)BD may consider whether the procuring activity has made and will continue to make available a significant number of its contracts to the 8(a) BD program on a non-competitive basis.

(3) The AA/8(a)BD may deny a request if the procuring activity previously offered the requirement to the 8(a) BD program on a noncompetitive basis and the request is made following the inability of the procuring activity and the potential sole source awardee to reach an agreement on price or some other material term or condition.

(d) *Sole source above thresholds.* Where a contract opportunity exceeds the applicable threshold amount and there is not a reasonable expectation that at least two eligible 8(a) Participants will submit offers at a fair price, the AA/8(a)BD may accept the requirement for a sole source 8(a) award if he or she determines that an eligible Participant in the 8(a) portfolio is capable of performing the requirement at a fair price.

§ 124.507 What procedures apply to competitive 8(a) procurements?

(a) *FAR procedures.* Procuring activities will conduct competitions among and evaluate offers received from Participants in accordance with the Federal Acquisition Regulation (48 CFR, chapter 1).

(b) *Eligibility determination by SBA.* In either a negotiated or sealed bid com-

petitive 8(a) acquisition, the procuring activity will request that the SBA district office servicing the apparent successful offeror determine that firm's eligibility for award.

(1) Within 5 working days after receipt of a procuring activity's request for an eligibility determination, SBA will determine whether the firm identified by the procuring activity is eligible for award.

(2) Eligibility is based on 8(a) BD program criteria, including whether the Participant is:

(i) A small business under the SIC code assigned to the requirement;

(ii) In compliance with any applicable competitive business mix target established or remedial measure imposed by § 124.509 that does not include the denial of future 8(a) contracts;

(iii) In the developmental stage of program participation if the solicitation restricts offerors to the developmental stage of participation; and

(iv) A concern with a bona fide place of business in the applicable geographic area if the procurement is for construction.

(3) If SBA determines that the apparent successful offeror is ineligible, SBA will notify the procuring activity. The procuring activity will then send to SBA the identity of the next highest evaluated firm for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award.

(4) Except to the extent set forth in paragraph (d) of this section, SBA determines whether a Participant is eligible for a specific 8(a) competitive requirement as of the date that the Participant submitted its initial offer which includes price.

(5) If the procuring activity contracting officer believes that the apparent successful offeror is not responsible to perform the contract, he or she must refer the concern to SBA for a possible Certificate of Competency in accord with § 125.5 of this title.

(c) *Restricted competition.* (1) *Competition within stages of program participation.* SBA may accept a competitive 8(a) requirement that is limited to Participants in the developmental stage of program participation, or may accept a requirement to be competed among

firms both in the developmental and transitional stages of program participation.

(2) *Construction competitions.* Based on its knowledge of the 8(a) BD portfolio, SBA will determine whether a competitive 8(a) construction requirement should be competed among only those Participants having a bona fide place of business within the geographical boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. Only those Participants with bona fide places of business within the appropriate geographical boundaries are eligible to submit offers.

(3) *Competition for all non-construction requirements.* Except for construction requirements, all eligible Participants regardless of location may submit offers in response to competitive 8(a) solicitations. The only geographic restrictions pertaining to 8(a) competitive requirements, other than those for construction requirements, are any imposed by the solicitations themselves.

(d) *Award to firms whose program terms have expired.* A concern that has completed its term of participation in the 8(a) BD program may be awarded a competitive 8(a) contract if it was a Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the contract solicitation, and if it continues to meet all other applicable eligibility criteria.

(1) Amendments to the solicitation extending the date for submissions of offers will be disregarded.

(2) For a negotiated procurement, a Participant may submit revised offers, including a best and final offer, and be awarded a competitive 8(a) contract if it was eligible as of the initial date specified for the receipt of offers in the solicitation, even though its program term may expire after that date.

§ 124.508 How is an 8(a) contract executed?

(a) An 8(a) contract can be awarded in the following ways:

(1) As a tripartite agreement in which the procuring activity, SBA and the Participant all sign the appropriate contract documents. There may be separate prime and subcontract docu-

ments (i.e., a prime contract between the procuring activity and SBA and a subcontract between SBA and the selected 8(a) concern) or a combined contract document representing both the prime and subcontract relationships; or

(2) Where SBA has delegated contract execution authority to the procuring activity, directly by the procuring activity through a contract between the procuring activity and the Participant.

(b) Where SBA receives a contract for signature valued at or below the simplified acquisition threshold, it will sign the contract and return it to the procuring activity within three (3) days of receipt.

(c) In order to be eligible to receive a sole source 8(a) contract, a firm must be a current Participant on the date of award. (See § 124.507(d) for competitive 8(a) awards.)

§ 124.509 What are non-8(a) business activity targets?

(a) *General.* (1) To ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after graduating from the 8(a) BD program, Participants must make maximum efforts to obtain business outside the 8(a) BD program.

(2) During both the developmental and transitional stages of the 8(a) BD program, a Participant must make substantial and sustained efforts, including following a reasonable marketing strategy, to attain the targeted dollar levels of non-8(a) revenue established in its business plan. It must attempt to use the 8(a) BD program as a resource to strengthen the firm for economic viability when program benefits are no longer available.

(b) *Required non-8(a) business activity targets during transitional stage.* (1) *General.* During the transitional stage of the 8(a) BD program, a Participant must achieve certain targets of non-8(a) contract revenue (i.e., revenue from other than sole source or competitive 8(a) contracts). These targets are called non-8(a) business activity targets and are expressed as a percentage of total revenue. The targets call for an increase in non-8(a) revenue over time.

(2) *Non-8(a) business activity targets.* During their transitional stage of program participation, Participants must meet the following non-8(a) business activity targets each year:

| Participant's year in the transitional stage | Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue) |
|--|---|
| 1 | 15 |
| 2 | 25 |
| 3 | 35 |
| 4 | 45 |
| 5 | 55 |

(3) *Compliance with non-8(a) business activity targets.* SBA will measure the Participant's compliance with the applicable non-8(a) business activity target at the end of each program year in the transitional stage based on the Participant's latest fiscal year-end total revenue. Thus, at the end of the first year in the transitional stage of program participation, SBA will compare the Participant's non-8(a) revenue to its total revenue during that first year. If appropriate, SBA will require remedial measures during the subsequent program year. Thus, for example, non-compliance with the required non-8(a) business activity target in year one of the transitional stage would cause SBA to initiate remedial measures under paragraph (d) of this section for year two in the transitional stage.

(4) *Certification of compliance.* A Participant must certify as part of its offer that it complies with the applicable non-8(a) business activity target or with the measures imposed by SBA under paragraph (d) of this section before it can receive any 8(a) contract during the transitional stage of the 8(a) BD program.

(c) *Reporting and verification of business activity.* (1) Once admitted to the 8(a) BD program, a Participant must provide to SBA as part of its annual review:

(i) Annual financial statements with a breakdown of 8(a) and non-8(a) revenue in accord with § 124.602; and

(ii) An annual report within 30 days from the end of the program year of all non-8(a) contracts, options, and modifications affecting price executed during the program year.

(2) At the end of each year of participation in the transitional stage, the BOS assigned to work with the Participant will review the Participant's total revenues to determine whether the non-8(a) revenues have met the applicable target. In determining compliance, SBA will compare all 8(a) revenues received during the year, including those from options and modifications, to all non-8(a) revenues received during the year.

(d) *Consequences of not meeting competitive business mix targets.* (1) Except as set forth in paragraph (e) of this section, beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), any firm that does not meet its applicable competitive business mix target for the just completed program year will be ineligible for sole source 8(a) contracts in the current program year, unless and until the Participant corrects the situation as described in paragraph (d)(2) of this section.

(2) If SBA determines that an 8(a) Participant has failed to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA may increase its monitoring of the Participant's contracting activity during the ensuing program year. SBA will also notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until it has demonstrated to SBA that it has complied with its non-8(a) business activity requirements as described in paragraphs (d)(2)(i) and (d)(2)(ii) of this section. In order for a Participant to come into compliance with the non-8(a) business activity target and be eligible for further 8(a) sole source contracts, it may:

(i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non-8(a) business activity target; or

(ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current program year. If the Participant

satisfies the requirements of paragraphs (d)(2)(ii)(A) or (d)(2)(ii)(B) of this section, SBA will reinstate the Participant's ability to get sole source 8(a) contracts prior to its annual review.

(A) To qualify for reinstatement during the first six months of the current program year (i.e., at either the first or second quarterly review), the Participant must demonstrate that it has received non-8(a) revenue and new non-8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its non-8(a) business activity target for the just completed program year. For this purpose, SBA will not count options on existing non-8(a) contracts in determining whether a Participant has received new non-8(a) contract awards.

(B) To qualify for reinstatement during the last six months of the current program year (i.e., at either the nine-month or one year review), the Participant must demonstrate that it has achieved its non-8(a) business activity target as of that point in the current program year.

Example 1 to paragraph (d)(2). Firm A had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), but failed to meet the minimum non-8(a) business activity target of 25 percent. It had 8(a) revenues of \$8.5 million and non-8(a) revenues of \$1.5 million (15 percent). Based on total revenues of \$10 million, Firm A should have had at least \$2.5 million in non-8(a) revenues. Thus, Firm A missed its target by \$1 million (its target (\$2.5 million) minus its actual non-8(a) revenues (\$1.5 million)). Because Firm A did not achieve its non-8(a) business activity target, it cannot receive 8(a) sole source awards until correcting that situation. The firm may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non-8(a) revenue to SBA quarterly. Firm A elects to submit information to SBA quarterly in year 3 of the transitional stage (year 7 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Firm A must show that it has received non-8(a) revenue and/or been awarded new non-8(a) contracts totaling \$1 million (the amount by which it missed its target in year 2 of the transitional stage).

Example 2 to paragraph (d)(2). Firm B had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), of which \$8.5 million were 8(a) reve-

nues and \$1.5 million were non-8(a) revenues. At its first two quarterly reviews during year 3 of the transitional stage (year 7 in the program), Firm B could not demonstrate that it had received at least \$1 million in non-8(a) revenue and new non-8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Firm B must show that at least 35% (the non-8(a) business activity target for year 3 in the transitional stage) of all revenues received during year 3 in the transitional stage as of that point are from non-8(a) sources.

(3) In determining whether a Participant has achieved its required non-8(a) business activity target at the end of any program year in the transitional stage, or whether a Participant that failed to meet the target for the previous program year has achieved the required level of non-8(a) business at its nine-month review, SBA will measure 8(a) support by adding the base year value of all 8(a) contracts awarded during the applicable program year to the value of all options and modifications executed during that year.

(4) As a condition of eligibility for new 8(a) contracts, SBA may also impose other requirements on a Participant that fails to achieve the non-8(a) business activity targets. These include requiring the Participant to obtain management assistance, technical assistance, and/or counseling, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation.

(5) SBA may initiate proceedings to terminate a Participant from the 8(a) BD program where the firm makes no good faith efforts to obtain non-8(a) revenues.

(e) *Waiver of sole source prohibition.* (1) The AA/8(a)BD, or his or her designee, may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when a Participant does not meet its non-8(a) business activity target where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target. The decision to grant or deny a request for a waiver is

at SBA's discretion, and no appeal may be taken with respect to that decision.

(2) The SBA Administrator on a non-delegable basis may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to the SBA Administrator that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

§ 124.510 What percentage of work must a Participant perform on an 8(a) contract?

(a) To assist the business development of Participants in the 8(a) BD program, an 8(a) contractor must perform certain percentages of work with its own employees. These percentages and the requirements relating to them are the same as those established for small business set-aside prime contractors, and are set forth in § 125.6 of this title.

(b) A Participant must certify in its offer that it will meet the applicable percentage of work requirement. SBA will determine whether the firm will be in compliance as of the date of award of the contract for both sealed bid and negotiated procurements.

(c) *Indefinite quantity contracts.* (1) In order to ensure that the required percentage of costs on an indefinite quantity 8(a) award is performed by the Participant, the Participant must demonstrate semiannually that it has performed the required percentage to that date. For a service or supply contract, this does not mean that the Participant must perform 50 percent of the applicable costs for each task order with its own force, or that a Participant must have performed 50 percent of the applicable costs at any point in time during the contract's life. Rather, the Participant must perform 50 percent of the applicable costs for the combined total of all task orders issued to date at six month intervals.

Example to paragraph (c)(1). Two task orders are issued under an 8(a) indefinite quantity service contract during the first six months of the contract. If \$100,000 in personnel costs are incurred on the first task

order, 90% of those costs (\$90,000) are incurred for performance by the Participant's own work force, and the second task order also requires \$100,000 in personnel costs, the Participant would have to perform only 10 percent of the personnel costs on the second task order because it would still have performed 50% of the total personnel costs at the end of the six-month period (\$100,000 out of \$200,000).

(2) Where there is a guaranteed minimum condition in an indefinite quantity 8(a) award, the required performance of work percentage need not be met on task orders issued during the first six months of the contract. In such a case, however, the percentage of work that a Participant may further contract to other concerns during the first six months of the contract may not exceed 50 percent of the total guaranteed minimum dollar value to be provided by the contract. Once the guaranteed minimum amount is met, the general rule for indefinite quantity contracts set forth in paragraph (c)(1) of this section applies.

Example to paragraph (c)(2). Where a contract guarantees a minimum of \$100,000 in professional services and the first task order is for \$60,000 in such services, the Participant may perform as little as \$10,000 of the personnel costs for that order. In such a case, however, the Participant must perform all of the next task order(s) up to \$40,000 to ensure that it performs 50% of the \$100,000 guaranteed minimum (\$10,000 + \$40,000 = \$50,000 or 50% of the \$100,000).

(3) The applicable SBA District Director may waive the provisions in paragraphs (c)(1) and (c)(2) of this section requiring a Participant to meet the applicable performance of work requirement at the end of any six-month period where he or she makes a written determination that larger amounts of subcontracting are essential during certain stages of performance, provided that there are written assurances from both the Participant and the procuring activity that the contract will ultimately comply with the requirements of this section. Where SBA authorizes a Participant to exceed the subcontracting limitations and the Participant does not ultimately comply with the performance of work requirements by the end of the contract, SBA will not grant future waivers for the Participant.

§ 124.511 How is fair market price determined for an 8(a) contract?

(a) The procuring activity determines what constitutes a “fair market price” for an 8(a) contract.

(1) The procuring activity must derive the estimate of a current fair market price for a new requirement, or a requirement that does not have a satisfactory procurement history, from a price or cost analysis. This analysis may take into account prevailing market conditions, commercial prices for similar products or services, or data obtained from any other agency. The analysis must also consider any cost or pricing data that is timely submitted by SBA.

(2) The procuring activity must base the estimate of a current fair market price for a requirement that has a satisfactory procurement history on recent award prices adjusted to ensure comparability. Adjustments will take into account differences in quantities, performance, times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other additional costs which may be appropriate.

(b) Upon the request of SBA, a procuring activity will provide to SBA a written statement detailing the method it has used to estimate the current fair market price for the 8(a) requirement. This statement must be submitted within 10 working days of SBA’s request. The procuring activity must identify the information, studies, analyses, and other data it used in making its estimate.

(c) The procuring activity’s estimate of fair market price and any supporting data may not be disclosed by SBA to any Participant or potential contractor.

(d) The concern selected to perform an 8(a) contract may request SBA to protest the procuring activity’s estimate of current fair market price to the Secretary of the Department or head of the agency in accordance with § 124.505.

§ 124.512 Delegation of contract administration to procuring agencies.

(a) SBA may delegate, by the use of special clauses in the 8(a) contract doc-

uments or by a separate agreement with the procuring activity, all responsibilities for administering an 8(a) contract to the procuring activity except the approval of novation agreements under 48 CFR 42.302(a)(25).

(b) This delegation of contract administration authorizes a contracting officer to execute any priced option or in scope modification without SBA’s concurrence. The contracting officer must, however, notify SBA of all modifications and options exercised.

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

(a) *General.* (1) If approved by SBA, a Participant may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing a specific 8(a) contract.

(2) A joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, and the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. However, where SBA concludes that an 8(a) concern brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA will not approve the joint venture arrangement.

(b) *Size of concerns to an 8(a) joint venture.* (1) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer as a small business for a competitive 8(a) procurement so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:

(i) The size of at least one 8(a) Participant to the joint venture is less than one half the size standard corresponding to the SIC code assigned to the contract; and

(ii)(A) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract; or

(B) For a procurement having an employee-based size standard, the procurement exceeds \$10 million;

(2) For sole source and competitive 8(a) procurements that do not exceed

the dollar levels identified in paragraph (b)(1) of this section, an 8(a) Participant entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the 8(a) contract. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the SIC code assigned to the 8(a) contract.

(3) Notwithstanding the provisions of paragraphs (b)(1) and (b)(2) of this section, a joint venture between a protege firm and its approved mentor (see § 124.520) will be deemed small provided the protege qualifies as small for the size standard corresponding to the SIC code assigned to the procurement and has not reached the dollar limit set forth in § 124.519.

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform an 8(a) contract, including those between mentors and proteges authorized by § 124.520, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating an 8(a) Participant as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for performance of the 8(a) contract;

(3) Stating that not less than 51 percent of the net profits earned by the joint venture will be distributed to the 8(a) Participant(s);

(4) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an 8(a) contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(5) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;

(6) Specifying the responsibilities of the parties with regard to contract per-

formance, source of labor and negotiation of the 8(a) contract;

(7) Obligating all parties to the joint venture to ensure performance of the 8(a) contract and to complete performance despite the withdrawal of any member;

(8) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(9) Requiring the final original records be retained by the managing venturer upon completion of the 8(a) contract performed by the joint venture;

(10) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(11) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Performance of work.* For any 8(a) contract, including those between mentors and proteges authorized by § 124.520, the joint venture must perform the applicable percentage of work required by § 124.510, and the 8(a) partner(s) to the joint venture must perform a significant portion of the contract.

(e) *Prior approval by SBA.* SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.

(f) *Contract execution.* Where SBA has approved a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity.

(g) *Amendments to joint venture agreement.* All amendments to the joint venture agreement must be approved by SBA.

(h) *Inspection of records.* SBA may inspect the records of the joint venture without notice at any time deemed necessary.

§ 124.514 Exercise of 8(a) options and modifications.

(a) *Unpriced options.* The exercise of an unpriced option is considered to be a new contracting action.

(1) If a concern has graduated or been terminated from the 8(a) BD program or is no longer small under the size standard corresponding to the SIC code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised.

(2) If the concern is still a Participant and otherwise eligible for the requirement on a sole source basis, the procuring activity contracting officer may negotiate price and exercise the option provided the option, considered a new contracting action, meets all regulatory requirements, including the procuring activity's offering and SBA's acceptance of the requirement for the 8(a) BD program.

(3) If the estimated fair market price of the option exceeds the applicable threshold amount set forth in § 124.506, the requirement must be competed as a new contract among eligible Participants.

(b) *Priced options.* The procuring activity contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

(c) *Modifications beyond the scope.* A modification beyond the scope of the initial 8(a) contract award is considered to be a new contracting action. It will be treated the same as an unpriced option as described in paragraph (a) of this section.

(d) *Modifications within the scope.* The procuring activity contracting officer may exercise a modification within the scope of the initial 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?

(a) An 8(a) contract must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section.

(1) An 8(a) contract, whether in the base or an option year, must be terminated for the convenience of the Government if:

(i) One or more of the individuals upon whom eligibility for the 8(a) BD program was based relinquishes or enters into any agreement to relinquish ownership or control of the Participant such that the Participant would no longer be controlled or at least 51% owned by disadvantaged individuals; or

(ii) The contract is transferred or novated for any reason to another firm.

(2) The procuring activity may not assess repurchase costs or other damages against the Participant due solely to the provisions of this section.

(b) The SBA Administrator may waive the requirements of paragraph (a)(1) of this section if requested to do so by the 8(a) contractor when:

(1) It is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing;

(2) Ownership and control of the concern that is performing the 8(a) contract will pass to another Participant, but only if the acquiring firm would otherwise be eligible to receive the award directly as an 8(a) contract;

(3) Any individual upon whom eligibility was based is no longer able to exercise control of the concern due to physical or mental incapacity or death;

(4) The head of the procuring agency, or an official with delegated authority from the agency head, certifies that termination of the contract would severely impair attainment of the agency's program objectives or missions; or

(5) It is necessary for the disadvantaged owners of the initial 8(a) awardee to relinquish ownership of a majority

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of the voting stock of the concern in order to raise equity capital, but only if—

(i) The concern has graduated from the 8(a) BD program;

(ii) The disadvantaged owners will maintain ownership of the largest single outstanding block of voting stock (including stock held by affiliated parties); and

(iii) The disadvantaged owners will maintain control of the daily business operations of the concern.

(c) The 8(a) contractor must request a waiver in writing prior to the change of ownership and control except in the case of death or incapacity. A request for waiver due to incapacity or death must be submitted within 60 days after such occurrence. The Participant seeking to change ownership or control must specify the grounds upon which it requests a waiver, and must demonstrate that the proposed transaction would meet such grounds.

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in § 124.507(b)(2) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is a responsible and eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring firm must certify that it is a small business for the size standard corresponding to the SIC code assigned to each contract for which a waiver is sought.

(e) Anyone other than a procuring agency head who submits a certification regarding the impairment of the agency's objectives under paragraph (b)(4) of this section, must also certify delegated authority to make the certification.

(f) In processing a request for a waiver under paragraph (b)(2) of this section, SBA will treat a transfer of all a Participant's operating assets to another Participant the same as the transfer of an ownership interest, provided the Participant that transfers its assets to another eligible Participant:

(1) Voluntarily graduates from the 8(a) BD program; and

(2) Ceases its business operations, or presents a plan to SBA for its orderly dissolution.

(g) A concern performing an 8(a) contract must notify SBA in writing immediately upon entering into an agreement or agreement in principle (either oral or written) to transfer all or part of its stock or other ownership interest or assets to any other party. Such an agreement could include an oral agreement to enter into a transaction to transfer interests in the future.

(h) The Administrator has discretion to decline a request for waiver even though legal authority exists to grant the waiver.

(i) The 8(a) contractor may appeal SBA's denial of a waiver request by filing a petition with OHA pursuant to part 134 of this title within 45 days of the date of service (as defined in § 134.204) of the Administrator's decision.

§ 124.516 Who decides contract disputes arising between a Participant and a procuring activity after the award of an 8(a) contract?

For purposes of the Disputes Clause of a specific 8(a) contract, the contracting officer is that of the procuring activity. A dispute arising between an 8(a) contractor and the procuring activity contracting officer will be decided by the procuring activity, and appeals may be taken by the 8(a) contractor without SBA involvement.

§ 124.517 Can the eligibility or size of a Participant for award of an 8(a) contract be questioned?

(a) The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.

(b) The size status of the apparent successful offeror for a competitive 8(a) procurement may be protested pursuant to § 121.1001(a)(2) of this chapter. The size status of a nominated Participant for a sole source 8(a) procurement may not be protested by another Participant or any other party.

(c) A Participant cannot appeal SBA's determination not to award it a

specific 8(a) contract because the concern lacks an element of responsibility or is ineligible for the contract, other than the right set forth in § 124.501(h) to request a formal size determination where SBA cannot verify it to be small.

(d)(1) The SIC code assigned to a sole source 8(a) requirement may not be challenged by another Participant or any other party either to SBA or any administrative forum as part of a bid or contract protest. Only the AA/8(a)BD may appeal a SIC code designation with respect to a sole source 8(a) requirement.

(2) In connection with a competitive 8(a) procurement, any interested party who has been adversely affected by a SIC code designation may appeal the designation to SBA's OHA pursuant to § 121.1103 of this title.

(e) Anyone with information questioning the eligibility of a Participant to continue participation in the 8(a) BD program or for purposes of a specific 8(a) contract may submit such information to SBA under § 124.112(c).

§ 124.518 How can an 8(a) contract be terminated before performance is completed?

(a) *Termination for default.* A decision to terminate a specific 8(a) contract for default can be made by the procuring activity contracting officer after consulting with SBA. The contracting officer must advise SBA of any intent to terminate an 8(a) contract for default in writing before doing so. SBA may provide to the Participant any program benefits reasonably available in order to assist it in avoiding termination for default. SBA will advise the contracting officer of this effort. Any procuring activity contracting officer who believes grounds for termination continue to exist may terminate the 8(a) contract for default, in accordance with the Federal Acquisition Regulations (48 CFR chapter 1). SBA will have no liability for termination costs or reprocurement costs.

(b) *Termination for convenience.* After consulting with SBA, the procuring activity contracting officer may terminate an 8(a) contract for convenience when it is in the best interests of the Government to do so. A termination for convenience is appropriate if any

disadvantaged owner of the Participant performing the contract relinquishes ownership or control of such concern, or enters into any agreement to relinquish such ownership or control, unless a waiver is granted pursuant to § 124.515.

(c) *Substitution of one 8(a) contractor for another.* Where a procuring activity contracting officer demonstrates to SBA that an 8(a) contract will otherwise be terminated for default, SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of the contract without invoking the termination for convenience or waiver provisions of § 124.515.

§ 124.519 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?

(a) A Participant (other than one owned by an Indian tribe or an ANC) may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of the dollar amount set forth in this section during its participation in the 8(a) BD program.

(1) For a firm having a revenue-based primary SIC code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is five times the size standard corresponding to that SIC code as of the date of SBA's acceptance of the requirement for the 8(a) BD program or \$100,000,000, whichever is less.

(2) For a firm having an employee-based primary SIC code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is \$100,000,000.

(3) SBA will not consider 8(a) contracts awarded under \$100,000 in determining whether a Participant has reached the limit identified in paragraphs (a)(1) and (a)(2) of this section.

(b) Once the limit is reached, a firm may not receive any more 8(a) sole source contracts, but may remain eligible for competitive 8(a) awards.

(c) The limitation set forth in paragraph (a) of this section will not apply for firms that are current Participants in the 8(a) BD program as of December 31, 1997.

(d) SBA includes the dollar value of 8(a) options and modifications in determining whether a Participant has reached the limit identified in paragraph (a) of this section. If an option is not exercised or the contract value is reduced by modification, SBA will deduct those values.

(e) A Participant's eligibility for a sole source award in terms of whether it has exceeded the dollar limit for 8(a) contracts is measured as of the date that the requirement is accepted for the 8(a) program without taking into account whether the value of that award will cause the limit to be exceeded.

(f) The SBA Administrator on a non-delegable basis may waive the requirement prohibiting a Participant from receiving sole source 8(a) contracts in excess of the dollar amount set forth in this section where the head of a procuring activity represents to the SBA Administrator that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

§ 124.520 Mentor/protege program.

(a) *General.* The mentor/protege program is designed to encourage approved mentors to provide various forms of assistance to eligible Participants. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing prime contracts with the Government in the form of joint venture arrangements. The purpose of the mentor/protege relationship is to enhance the capabilities of the protege and to improve its ability to successfully compete for contracts.

(b) *Mentors.* Any concern that demonstrates a commitment and the ability to assist developing 8(a) Participants may act as a mentor and receive benefits as set forth in this section. This includes businesses that have graduated from the 8(a) BD program, firms that are in the transitional stage of program participation, other small businesses, and large businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:

(i) Possesses favorable financial health, including profitability for at least the last two years;

(ii) Possesses good character;

(iii) Does not appear on the federal list of debarred or suspended contractors; and

(iv) Can impart value to a protege firm due to lessons learned and practical experience gained because of the 8(a) BD program, or through its general knowledge of government contracting.

(2) Generally, a mentor will have no more than one protege at a time. However, the AA/8(a)BD may authorize a concern to mentor more than one protege at a time where the concern can demonstrate that the additional mentor/protege relationship will not adversely affect the development of either protege firm (e.g., the second firm cannot be a competitor of the first firm).

(3) In order to demonstrate its favorable financial health, a firm seeking to be a mentor must submit its federal tax returns for the last two years to SBA for review.

(4) Once approved, a mentor must annually certify that it continues to possess good character and a favorable financial position.

(c) *Proteges.* (1) In order to initially qualify as a protege firm, a Participant must:

(i) Be in the developmental stage of program participation;

(ii) Have never received an 8(a) contract; or

(ii) Have a size that is less than half the size standard corresponding to its primary SIC code.

(2) Only firms that are in good standing in the 8(a) BD program (e.g., firms that do not have termination or suspension proceedings against them, and are up to date with all reporting requirements) may qualify as a protege.

(3) A protege firm may have only one mentor at a time.

(d) *Benefits.* (1) A mentor and protege may joint venture as a small business for any government procurement, including procurements less than half the size standard corresponding to the assigned SIC code and 8(a) sole source contracts, provided both the mentor and the protege qualify as small for the procurement and, for purposes of 8(a)

sole source requirements, the protege has not reached the dollar limit set forth in § 124.519.

(2) Notwithstanding the requirements set forth in §§ 124.105(g) and (h), in order to raise capital for the protege firm, the mentor may own an equity interest of up to 40% in the protege firm.

(3) Notwithstanding the mentor/protege relationship, a protege firm may qualify for other assistance as a small business, including SBA financial assistance.

(4) No determination of affiliation or control may be found between a protege firm and its mentor based on the mentor/protege agreement or any assistance provided pursuant to the agreement.

(e) *Written agreement.* (1) The mentor and protege firms must enter a written agreement setting forth an assessment of the protege's needs and describing the assistance the mentor commits to provide to address those needs (e.g., management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor). The agreement must also provide that the mentor will provide such assistance to the protege firm for at least one year.

(2) The written agreement must be approved by the AA/8(a)BD. The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protege, or if SBA determines that the agreement is merely a vehicle to enable a non-8(a) participant to receive 8(a) contracts.

(3) The agreement must provide that either the protege or the mentor may terminate the agreement with 30 days advance notice to the other party to the mentor/protege relationship and to SBA.

(4) SBA will review the mentor/protege relationship annually to determine whether to approve its continuation for another year.

(5) SBA must approve all changes to a mentor/protege agreement in advance.

(f) *Evaluating the mentor/protege relationship.* (1) In its annual business plan update required by § 124.403(a), the pro-

tege must report to SBA for the protege's preceding program year:

(i) All technical and/or management assistance provided by the mentor to the protege;

(ii) All loans to and/or equity investments made by the mentor in the protege;

(iii) All subcontracts awarded to the protege by the mentor, and the value of each subcontract;

(iv) All federal contracts awarded to the mentor/protege relationship as a joint venture (designating each as an 8(a), small business set aside, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and the percentage of revenue accruing to each party to the joint venture; and

(v) A narrative describing the success such assistance has had in addressing the developmental needs of the protege and addressing any problems encountered.

(2) The protege must annually certify to SBA whether there has been any change in the terms of the agreement.

(3) SBA will review the protege's report on the mentor/protege relationship as part of its annual review of the firm's business plan pursuant to § 124.403. SBA may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor/protege agreement or that the assistance has not resulted in any material benefits or developmental gains to the protege.

MISCELLANEOUS REPORTING REQUIREMENTS

§ 124.601 What reports does SBA require concerning parties who assist Participants in obtaining federal contracts?

(a) Each Participant must submit annually a written report to its assigned BOS that includes a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to assist such participant in

obtaining a Federal contract. The listing must indicate the amount of compensation paid and a description of the activities performed for such compensation.

(b) Failure to submit the report is good cause for the initiation of a termination proceeding pursuant to §§ 124.303 and 124.304.

§ 124.602 What kind of annual financial statement must a Participant submit to SBA?

(a) Participants with gross annual receipts of more than \$5,000,000 must submit to SBA audited annual financial statements prepared by a licensed independent public accountant within 120 days after the close of the concern's fiscal year.

(1) The servicing SBA District Director may waive the requirement for audited financial statements for good cause shown by the Participant.

(2) Circumstances where waivers of audited financial statements may be granted include, but are not limited to, the following:

(i) The concern has an unexpected increase in sales towards the end of its fiscal year that creates an unforeseen requirement for audited statements;

(ii) The concern unexpectedly experiences severe financial difficulties which would make the cost of audited financial statements a particular burden; and

(iii) The concern has been a Participant less than 12 months.

(b) Participants with gross annual receipts between \$1,000,000 and \$5,000,000 must submit to SBA reviewed annual financial statements prepared by a licensed independent public accountant within 90 days after the close of the concern's fiscal year.

(c) Participants with gross annual receipts of less than \$1,000,000 must submit to SBA an annual statement prepared in-house or a compilation statement prepared by a licensed independent public accountant, verified as to accuracy by an authorized officer, partner, limited liability member, or sole proprietor of the Participant, including signature and date, within 90 days after the close of the concern's fiscal year.

(d) Any audited or reviewed financial statements submitted to SBA pursuant to paragraphs (a) or (b) of this section must be prepared in accordance with Generally Accepted Accounting Principles.

(e) While financial statements need not be submitted until 90 or 120 days after the close of a Participant's fiscal year, depending on the receipts of the concern, a Participant seeking to be awarded an 8(a) contract between the close of its fiscal year and such 90 or 120-day time period must submit a final sales report signed by the CEO or President to SBA in order for SBA to determine the concern's eligibility for the 8(a) contract. This report must show a breakdown of 8(a) and non-8(a) sales.

(f) Notwithstanding the amount of a Participant's gross annual receipts, SBA may require audited or reviewed statements whenever they are needed to obtain more complete information as to a concern's assets, liabilities, income or expenses, such as when the concern's capacity to perform a specific 8(a) contract must be determined, or when they are needed to determine continued program eligibility.

§ 124.603 What reports regarding the continued business operations of former Participants does SBA require?

Former Participants must provide such information as SBA may request concerning the former Participant's continued business operations, contracts, and financial condition for a period of three years following the date on which the concern graduates or is terminated from the program. Failure to provide such information when requested will constitute a violation of the regulations set forth in this part, and may result in the nonexercise of options on or termination of contracts awarded through the 8(a) BD program, debarment, or other legal recourse.

MANAGEMENT AND TECHNICAL
ASSISTANCE PROGRAM

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§ 124.701 What is the purpose of the 7(j) management and technical assistance program?

Section 7(j)(1) of the Small Business Act, 15 U.S.C. 636(j)(1), authorizes SBA to enter into grants, cooperative agreements, or contracts with public or private organizations to pay all or part of the cost of technical or management assistance for individuals or concerns eligible for assistance under sections 7(a)(11), 7(j)(10), or 8(a) of the Small Business Act.

§ 124.702 What types of assistance are available through the 7(j) program?

Through its private sector service providers, SBA may provide a wide variety of management and technical assistance to eligible individuals or concerns to meet their specific needs, including:

- (a) Counseling and training in the areas of financing, management, accounting, bookkeeping, marketing, and operation of small business concerns; and
- (b) The identification and development of new business opportunities.

§ 124.703 Who is eligible to receive 7(j) assistance?

The following businesses are eligible to receive assistance from SBA through its service providers:

- (a) Businesses which qualify as small under part 121 of this title, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and
- (b) Businesses eligible to receive 8(a) contracts.

§ 124.704 What additional management and technical assistance is reserved exclusively for concerns eligible to receive 8(a) contracts?

In addition to the management and technical assistance available under § 124.702, Section 7(j)(10) of the Small Business Act authorizes SBA to provide additional management and technical assistance through its service providers exclusively to small business concerns eligible to receive 8(a) contracts, including:

- (a) Assistance to develop comprehensive business plans with specific business targets, objectives, and goals;
- (b) Other nonfinancial services necessary for a Participant's growth and development, including loan packaging; and
- (c) Assistance in obtaining equity and debt financing.

Subpart B—Eligibility, Certification, and Protests Relating to Federal Small Disadvantaged Business Programs

SOURCE: 63 FR 35772, June 30, 1998, unless otherwise noted.

§ 124.1001 General applicability.

(a) This subpart defines a Small Disadvantaged Business (SDB). It also sets forth procedures by which a firm can apply to be recognized as an SDB, including procedures to be used by private sector entities approved by SBA for determining whether a particular concern is owned and controlled by one or more disadvantaged individuals or Alaska Native Corporations (ANCs), Community Development Corporations (CDCs), Indian tribes (tribes) or Native Hawaiian Organizations (NHOs). Finally, this subpart establishes procedures by which SBA determines whether a particular concern qualifies as an SDB in response to a protest challenging the concern's status as disadvantaged. Unless specifically stated otherwise, the phrase "socially and economically disadvantaged individuals" in this subpart includes tribes, ANCs, CDCs, and NHOs.

(b) Only small firms that are owned and controlled by socially and economically disadvantaged individuals are eligible to participate in Federal SDB price evaluation adjustment, evaluation factor or subfactor, monetary subcontracting incentive, or set-aside programs, or SBA's section 8(d) subcontracting program.

(c) In order for a concern to represent that it is an SDB as a prime contractor for purposes of a Federal Government procurement, it must have:

- (1) Received a certification from SBA that it qualifies as an SDB; or

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(2) Submitted an application for SDB certification to SBA or a Private Certifier, and must not have received a negative determination regarding that application from SBA or the Private Certifier.

(d) A firm cannot represent itself to be an SDB concern in order to receive a preference as an SDB for any Federal subcontracting program if it is not on the SBA-maintained list of qualified SDBs.

§ 124.1002 What is a Small Disadvantaged Business (SDB)?

(a) *Reliance on 8(a) criteria.* In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, unless otherwise provided in this subpart. Qualified Private Certifiers must use the 8(a) criteria applicable to ownership and control in determining whether a particular firm is actually owned and controlled by one or more individuals claiming disadvantaged status.

(b) *SDB eligibility criteria.* A small disadvantaged business (SDB) is a concern:

(1) Which qualifies as small under part 121 of this title for the size standard corresponding to the applicable four digit Standard Industrial Classification (SIC) code.

(i) For purposes of SDB certification, the applicable SIC code is that which relates to the primary business activity of the concern;

(ii) For purposes related to a specific Federal Government contract, the applicable SIC code is that assigned by the contracting officer to the procurement at issue;

(2) Which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals as set forth in § 124.105. For the requirements relating to tribes and ANCs, NHOs, or CDCs, see §§ 124.109, 124.110, and 124.111, respectively.

(3) Except for tribes, ANCs, NHOs, and CDCs, whose management and daily business operations are controlled by one or more socially and economically disadvantaged individuals.

For the requirements relating to tribes and ANCs, NHOs, or CDCs, see §§ 124.109, 124.110, and 124.111, respectively.

(4) Which, for purposes of SDB procurement mechanisms authorized by 10 U.S.C. 2323 (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides) relating to the Department of Defense, NASA and the Coast Guard only, has the majority of its earnings accruing directly to the socially and economically disadvantaged individuals.

(c) *Disadvantaged status.* In assessing the personal financial condition of an individual claiming economic disadvantage, his or her net worth must be less than \$750,000 after taking into account the exclusions set forth in § 124.104(c)(2).

(d) *Additional eligibility criteria.* Except for tribes, ANCs, CDCs and NHOs, each individual claiming disadvantaged status must be a citizen of the United States.

(e) *Potential for success not required.* The potential for success requirement set forth in § 124.107 does not apply as an eligibility requirement for an SDB.

(f) *Joint ventures.* Joint ventures are permitted for SDB procurement mechanisms (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides), provided that the requirements set forth in this paragraph are met.

(1) The disadvantaged participant(s) to the joint venture must have:

(i) Received an SDB certification from SBA; or

(ii) Submitted an application for SDB certification to SBA or a Private Certifier, and must not have received a negative determination regarding that application.

(2) For purposes of this paragraph, the term joint venture means two or more concerns forming an association to engage in and carry out a single, specific business venture for joint profit. Two or more concerns that form an ongoing relationship to conduct business would not be considered "joint venturers" within the meaning of this paragraph, and would also not be eligible to be certified as an SDB. The entity created by such a relationship would

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not be owned and controlled by one or more socially and economically disadvantaged individuals. Each contract for which a joint venture submits an offer will be evaluated on a case by case basis.

(3) Except as set forth in 13 CFR 121.103(f)(3), a concern that is owned and controlled by one or more socially and economically disadvantaged individuals entering into a joint venture agreement with one or more other business concerns is considered to be affiliated with such other concern(s) for size purposes. If the exception does not apply, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the SIC code designated for the contract.

(4) An SDB must be the managing venturer of the joint venture, and an employee of the managing venturer must be the project manager responsible for performance of the contract.

(5) The joint venture must perform any applicable percentage of work required of SDB offerors, and the SDB joint venturer(s) must perform a significant portion of the contract.

(g) *Ownership restrictions for non-disadvantaged individuals.* The ownership restrictions set forth in § 124.105 (g) and (h) for non-disadvantaged individuals and concerns do not apply for purposes of determining SDB eligibility.

§ 124.1003 What is a Private Certifier?

A Private Certifier is an organization or business concern approved by SBA to determine whether firms are owned and controlled by one or more individuals claiming disadvantaged status. SBA may elect to arrange for one or more Private Certifiers to perform certain functions in the SDB Certification process. When that election is made, the provisions of §§ 124.1004 through 124.1007 will apply. SBA will establish more detailed standards regarding qualifications, monitoring, procedures and use, if any, of Private Certifiers in specific contracts or agreements between SBA and the Private Certifiers.

§ 124.1004 How does an organization or business concern become a Private Certifier?

(a) SBA may execute contracts or agreements with organizations or business concerns seeking to become Private Certifiers. Any such contract or agreement will include provisions for the oversight, monitoring, and evaluation of all certification activities by SBA.

(b) The organization or business concern must demonstrate a knowledge of SBA's regulations regarding ownership and control, as well as business organizations and the legal principles affecting their ownership and control generally, including stock issuances, voting rights, convertability of debt to equity, options, and powers and responsibilities of officers and directors, general and limited partners, and limited liability members.

(c) The organization or concern must also, along with its principals, demonstrate good character. Good character does not exist for these purposes if the organization or concern or any of its principals:

(1) Is debarred or suspended under any Federal procurement or non-procurement debarment and suspension regulations; or

(2) Has been indicted or convicted for any criminal offense or suffered a civil judgment indicating a lack of business integrity.

(d) As a condition of approval, SBA may require that appropriate officers and/or key employees of the concern attend a training session on SBA's rules and requirements.

(e) An organization or concern seeking to become a Private Certifier must agree to provide access to SBA of its books and records when requested, including records pertaining to its certification activities. Once SBA approves the organization or concern to be a Private Certifier, SBA may review this information, as well as the decisions of the Private Certifier, in determining whether it will renew or extend the term of the Private Certifier, or terminate the Private Certifier for cause.

(f) SBA will include in any contract or agreement document authorizing an

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entity to act as a Private Certifier appropriate conditions to prohibit conflicts of interests between the Private Certifier and the firms for which it processes SDB applications and to protect the integrity of the decision-making process.

§ 124.1005 Can a fee be charged to a firm to process the firm's application for SDB certification?

(a) With SBA's approval, a Private Certifier may charge a reasonable fee to a firm in order to screen the firm's application for completeness and to process a determination of ownership and control. The fee must be for actual services rendered and must not be related to whether or not the business concern is found to be owned and controlled by one or more individuals or entities claiming disadvantaged status.

(b) Where SBA makes the determination of ownership and control, SBA may collect a fee comparable to that which would be charged by a Private Certifier. From time to time, SBA will publish a Notice in the FEDERAL REGISTER identifying any fee that SBA will charge to process a firm's determination of ownership and control. SBA will promptly remit any funds received pursuant to this section to the Treasury of the United States as miscellaneous receipts.

§ 124.1006 Is there a list of Private Certifiers?

SBA will maintain a list of approved Private Certifiers on SBA's Home Page on the Internet. Any interested person may also obtain a copy of the list from the local SBA district office.

§ 124.1007 How long may an organization or business concern be a Private Certifier?

(a) SBA's approval document will specify how long the organization or concern may be a Private Certifier. The initial contract or agreement will have a base period of one year, and may include option years or renewal provisions.

(b) SBA may terminate a contract or agreement with an organization or business concern which is a Private Certifier for the convenience of the Government at any time, and may ter-

minate the contract or agreement for default where appropriate. Specific grounds for termination for default include, but are not limited to:

(1) Charging improper, unreasonable or contingent fees in violation of § 124.1005;

(2) Engaging in prohibited business transactions with the firms for which it processes SDB applications in violation of § 124.1004(f); or

(3) A demonstrated record of ownership and control determinations that are overturned on appeal by SBA's Office of Hearings and Appeals (OHA) or by SBA as part of an SDB protest.

§ 124.1008 How does a firm become certified as an SDB?

Any firm may apply to be certified as an SDB. SBA's field offices will provide further information and required application forms to any firm interested in SDB certification. In order to become certified as an SDB, a firm must apply to SBA or, if directed by SBA, to a Private Certifier. The application must include evidence demonstrating that the firm is owned and controlled by one or more individuals claiming disadvantaged status, along with certifications or narratives regarding the disadvantaged status of such individuals. See paragraph (e)(1) of this section. The firm also must submit information necessary for a size determination. See § 121.1008. Current 8(a) BD Participants do not need to submit applications for SDB status. These concerns automatically qualify as SDBs by virtue of their status as 8(a) BD concerns. An 8(a) Participant's continuing eligibility as an SDB will be reviewed as part of the concern's 8(a) annual review.

(a) *Filing an SDB application.* (1) An interested firm must first submit a complete application to SBA's Assistant Administrator for Small Disadvantaged Business Certification and Eligibility (AA/SDBCE), Small Business Administration, 409 3rd Street, SW, Washington, DC 20416, or to a specific SBA field office or an approved Private Certifier if directed by SBA.

(2) The firm must identify which individual(s) or entities are claiming disadvantaged status.

(b) *Required forms.* Each firm seeking to be certified as an SDB must submit

those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments may include, but not be limited to, financial statements, Federal personal and business tax returns and personal history statements. The application package may be in the form of an electronic application.

(c) *Application processing.* (1) SBA or a Private Certifier will advise each applicant generally within 15 days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required. If the application is not complete, SBA or the Private Certifier will return the application to the firm, and will notify the firm that it may re-apply when its application is complete.

(2) The burden is on the applicant to demonstrate that those individuals claiming disadvantaged status own and control the concern.

(d) *Ownership and control decision.* SBA or a Private Certifier will determine whether those individuals claiming disadvantaged status own and control the applicant firm within 30 days of receipt of a complete application package, whenever practicable.

(1) Where a Private Certifier determines ownership and control, the Private Certifier will issue a written decision as to whether the applicant is owned and controlled by the individuals identified as claiming disadvantaged status.

(i) If the Private Certifier finds that the applicant is owned and controlled by the individuals claiming disadvantaged status, the Private Certifier will forward the application to SBA along with a copy of its ownership and control determination and the information required by paragraph (e)(2)(ii) of this section, where appropriate.

(ii) If the Private Certifier finds that the applicant is not owned and controlled by the individuals claiming disadvantaged status, its decision must state the specific reasons for the finding, and inform the applicant of its right to appeal the decision to SBA pursuant to § 124.1009.

(2) Where SBA determines ownership and control, SBA will first determine whether the applicant is owned and

controlled by the individual(s) claiming to be disadvantaged. If SBA determines that the applicant is not owned and controlled by the individual(s) claiming disadvantaged status, SBA will issue a written decision addressing only the ownership and control issues. If SBA determines that the applicant is owned and controlled by the individual(s) claiming disadvantaged status, SBA will issue a single written decision as to whether the applicant qualifies as an SDB. Such a determination will include the ownership and control of the firm, the size status of the firm, and the disadvantaged status of those individuals claiming to be disadvantaged.

(3) In its sole discretion, SBA may analyze and determine whether a firm is owned and controlled by one or more individuals claiming disadvantaged status notwithstanding the availability of a Private Certifier to make such a decision.

(4) SBA reserves the right to re-evaluate an approved decision on ownership and control by a Private Certifier in a case where it has credible evidence that the Private Certifier has substantially disregarded the eligibility criteria.

(e) *Disadvantaged determination.* Once a concern receives a decision finding that it is owned and controlled by those individuals or entities claiming disadvantaged status (either through an initial determination or on appeal), SBA will determine whether the other eligibility criteria are met, and, if so, will include the SDB on the SBA-maintained list of qualified SDBs. SBA will make this determination within 30 days of receiving an SDB application, if practicable.

(1) *Members of designated groups.* (i) Those individuals claiming disadvantaged status that are members of the same designated groups that are presumed to be socially disadvantaged for purposes of SBA's 8(a) BD program (see § 124.103(b)) are presumed to be socially and economically disadvantaged for purposes of SDB certification. These individuals must represent that they are members of one of the designated groups, that they are identified as a member of one of the designated groups, that their net worth is less

than \$750,000 after taking into account the exclusions set forth in § 124.104(c)(2), and that they are citizens of the United States.

(ii) Absent credible evidence to the contrary, SBA may accept these representations as true and certify the firm as an SDB.

(2) *Individuals not members of designated groups.* (i) Each individual claiming disadvantaged status who is not a member of one of the designated groups must submit a statement identifying personally how his or her entry into or advancement in the business world has been impaired because of personally specific factors (see § 124.103(c)), and how his or her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities (see §§ 124.103(c) and 124.104).

(ii) Where a Private Certifier determines ownership and control, the Private Certifier must also review the disadvantaged status submission and any other required information, and send to SBA the following:

(A) An executive summary and analysis of the disadvantaged status submission;

(B) The application and all supporting documentation; and

(C) A certification that the application is complete and suitable for evaluation.

(3) *Concerns owned by tribes, ANCs, CDCs, or NHOs:* SBA will process SDB applications from concerns owned and controlled by tribes, ANCs, CDCs, or NHOs in the same way as those from concerns owned by individuals who are members of designated groups.

(f) *SDB Determination.* (1) If SBA's AA/SDBCE determines that the individual(s) claiming disadvantage are disadvantaged and other eligibility criteria are met, he or she will certify the firm as an SDB.

(2) If SBA's AA/SDBCE determines that one or more of the individuals claiming to be disadvantaged is not disadvantaged and their disadvantaged status is required to establish disadvantaged ownership and control of the applicant, or any of the other eligibility criteria are not met, he or she will reject the firm's application for SDB certification. The AA/SDBCE will

issue a written decision setting forth SBA's reasons for decline.

(3) Pursuant to part 134 of this title, a firm may appeal to OHA the AA/SDBCE's decision that one or more of the individuals claiming disadvantaged status is not disadvantaged, or, where SBA determines ownership and control, that those claiming disadvantaged status do not own and control the applicant. (See § 124.1009 for appeals from decisions by Private Certifiers.)

(i) The firm must serve SBA's Associate General Counsel for General Law with a copy of the appeal.

(ii) OHA will determine whether SBA's decision in either case was arbitrary, capricious, or contrary to law. OHA's review is limited to the facts that were before SBA at the time of its decision and any arguments submitted in or in response to the appeal. OHA will not consider any facts beyond those that were already presented to SBA unless the administrative judge determines that manifest injustice would occur if the appeal were limited to the record.

(4) A firm may also request a formal size determination pursuant to part 121 of this title where SBA finds that the firm is not small.

(g) *Current 8(a) BD program participants.* Any firm that is currently a Participant in SBA's 8(a) BD program need not seek an ownership and control determination or apply to SBA for a separate certification as an SDB. SBA will certify current 8(a) BD Participants as SDBs, and automatically include them on the list of qualified SDBs.

(h) *8(a) BD graduates.* SBA will automatically certify a firm that has graduated from the SBA's 8(a) BD program to be an SDB, provided SBA determined that the firm continued to be eligible for the 8(a) BD program as part of an annual review within the last three years. (See § 124.1014(b)).

(i) *Certification by DOT recipient.* If a firm applying for SDB certification has a current, valid certification as a disadvantaged business enterprise (DBE) from a Department of Transportation (DOT) recipient, SBA may adopt the DBE certification as an SDB certification when determined by the AA/SDBCE or designee to be appropriate.

§ 124.1009 How does a firm appeal a decision of a Private Certifier?

Where a Private Certifier performs an ownership and control determination and finds that a firm is not owned and controlled by the individual(s) claiming disadvantaged status, the firm may appeal that decision to OHA pursuant to part 134 of this title. The firm must serve SBA's Associate General Counsel for General Law and the applicable Private Certifier with a copy of the appeal.

(a) The Private Certifier must submit to OHA the full record upon which its decision was based within two days of receiving notification that an appeal has been filed.

(b) The Private Certifier and SBA may each elect to appear or not appear in an appeal proceeding.

(c) OHA's review is limited to the facts that were before the Private Certifier at the time of its final decision and any arguments submitted in or in response to the appeal. OHA will not consider any facts beyond those that were already presented to the Private Certifier unless the administrative judge determines that manifest injustice would occur if the appeal were limited to the record.

(d) OHA will decide whether it believes that the facts are supported by a preponderance of the evidence the Private Certifier's determination regarding ownership and control.

(e) Where the facts presented in the record leave significant doubt as to whether the petitioner is or is not owned and controlled by one or more individuals claiming to be disadvantaged, the administrative judge may remand the case to the Private Certifier for reconsideration in accord with his or her remand order.

(f) If OHA finds that the firm is owned and controlled by the individual(s) claiming disadvantaged status, OHA will refer the application to SBA for further processing. If OHA finds that the firm is not owned and controlled by such individual(s), the administrative judge will state the reasons for that decision, which will be the final decision of the Agency.

§ 124.1010 Can a firm represent itself to be an SDB if it has not yet been certified as an SDB?

(a) *General rule.* Except as set forth in paragraph (d) of this section, a firm may represent itself to be an SDB concern in order to receive a preference as an SDB for any Federal procurement program if it has submitted a complete application for SDB certification to SBA or a Private Certifier and it has not received a negative determination regarding that application from SBA or the Private Certifier. A firm that has received a negative determination of ownership and control or a negative determination regarding its disadvantaged status and is awaiting the resolution of its appeal of that determination may not represent itself to be an SDB.

(b) *Where applicant becomes successful offeror.* If a concern becomes the apparent successful offeror on a contract for which it would receive a benefit for being an SDB while its application for SDB certification is pending, either at SBA or a Private Certifier, the contracting officer for the particular contract must immediately inform SBA's AA/SDBCE. SBA will then prioritize the firm's SDB application and make a determination regarding the firm's status as an SDB within 15 days from the date that SBA received the contracting officer's notification.

(1) Where the apparent successful offeror's completed application is pending an ownership and control determination with a Private Certifier, the concern must inform SBA which Private Certifier has its application. SBA will immediately contact the Private Certifier to require the Private Certifier to complete its ownership and control determination within 5 days of SBA's notification. In appropriate circumstances, SBA may undertake to make the determination itself, and may recoup the cost of the determination from the Private Certifier.

(2) If requested to do so by the procuring activity contracting officer, SBA will determine whether other offerors are SDBs where they have represented that their completed applications for SDB status are pending at SBA or a Private Certifier and they

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could receive the award if SBA determines that the apparently successful offeror is not an SDB.

(3) If the contracting officer does not receive an SBA determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer will presume that the apparently successful offeror, and any other offerors referred to SBA in connection with the same procurement by the contracting officer, are not disadvantaged, and will make award accordingly, unless the contracting officer grants an extension to the 15-day response period.

(c) *Representation as SDB for statistical purposes.* A firm may represent itself as an SDB concern for general statistical purposes without regard to any application for SDB certification or its inclusion on the SBA-maintained list of qualified SDB's.

(d) *Subcontracting programs.* Only firms that are on the SBA-maintained list of qualified SDBs may represent themselves as SDB concerns in order to receive a preference as an SDB for any Federal subcontracting program.

§ 124.1011 What is a misrepresentation of SDB status?

(a) Any person or entity that misrepresents a firm's status as a "small business concern owned and controlled by socially and economically disadvantaged individuals" ("SDB status") in order to obtain an 8(d) or SDB contracting opportunity or preference will be subject to the penalties imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as well as any other penalty authorized by law.

(b) A representation of SDB status by any firm that SBA has found not to be an SDB (either in connection with an SDB application or protest) will be deemed a misrepresentation of SDB status, unless and until the firm re-applies for and obtains SDB certification.

§ 124.1012 Can a firm reapply for SDB certification?

(a) A concern which has been denied SDB certification may reapply for certification at any time 12 months or more after the date of the most recent final decision of SBA to decline its ap-

plication (either on appeal of an ownership and control determination, or a negative finding of disadvantaged status).

(b) A concern which received a decision that it was not owned and controlled by the individual(s) claiming disadvantaged status from a Private Certifier and does not appeal that decision to OHA may apply for a new ownership and control determination at any time.

§ 124.1013 Is there a list of certified SDBs?

(a) If SBA certifies a firm to be an SDB, SBA will enter the name of the firm into an SBA-maintained central on-line register, such as PRO-Net.

(b) The register of SDBs will contain the names of all firms that are currently certified to be SDBs, including the names of all firms currently participating in SBA's 8(a) BD program.

(c) On a continuing basis, SBA will delete from the on-line register those firms that have:

(1) Graduated or been terminated from SBA's 8(a) BD program for any reason and have not otherwise received SDB certification (see, §§ 124.1008(h) and 124.1014(b) for treatment of 8(a) graduates);

(2) Been determined not to be an SDB in response to an SDB protest brought under § 124.1017; or

(3) Other than current 8(a) Participants, not received a renewed SDB certification after being on the register for three years (see § 124.1014(c)).

§ 124.1014 How long does an SDB certification last?

(a) Once SBA certifies a firm to be an SDB by placing it on the list of qualified SDBs, the firm will generally remain on the SBA-maintained list of certified SDBs for a period of three years from the date of its certification.

(1) A firm's SDB certification will extend beyond three years where SBA finds the firm to be an SDB:

(i) On the merits in connection with a particular protest (see § 124.1023(h)(2));

(ii) In connection with an SBA-initiated SDB determination (see § 124.1016(a)(2)); or

(iii) As part of an 8(a) BD annual review.

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(2) Where SBA finds a firm not to be an SDB in connection with an SDB protest, an SBA-initiated SDB determination, or an 8(a) BD annual review, SBA will immediately decertify the firm as an SDB and remove it from the qualified list of SDBs.

(b) A firm that graduates from the 8(a) BD program will remain on the list of certified SDBs for a period of three years from the date of its last annual review.

(c) To remain on the SDB register after three years, a firm whose status as an SDB has not been upheld in connection with a protest or an SBA-initiated SDB determination, or has not been certified as an eligible 8(a) Participant as part of an annual review, must submit a new application and receive a new certification.

§ 124.1015 What is the effect of receiving an SDB certification?

(a) A firm that is certified to be an SDB may represent itself as an SDB for such purposes as Federal price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentive programs, section 8(d) subcontracts, SDB set-asides, or any other programs which accept an SBA certification. A contracting officer may award a contract based on a firm's representation that it is a certified SDB absent a protest that the protested concern's circumstances have materially changed since SBA certified it as an SDB, or that the protested concern's SDB application contained false or misleading information (see § 124.1018(d)).

(b) For purposes of a particular Federal procurement, the firm must represent that it is both disadvantaged and small at the time it submits its initial offer including price (see part 121 of this title). At the same time, the firm must also represent that no material change has occurred in its SDB status since its SDB certification, or from the date of its application for SDB certification if its application has not yet been processed, and must specifically represent that the net worth of the disadvantaged individuals (not including concerns owned by tribes, ANCs, CDCs, or NHOs) upon whom the

SDB certification was based still does not exceed \$750,000.

(c) A firm's status as "disadvantaged" or "small" may be protested pursuant to §§ 124.1017 through 124.1021 and §§ 121.1001 through 121.1005, respectively, despite the presence of the firm on the SDB register, provided the protest contains specific allegations that the firm's circumstances have materially changed since SBA certified it as an SDB, or that the firm's SDB application contained false or misleading information.

§ 124.1016 Can SBA re-evaluate the SDB status of a firm after SBA certifies it to be SDB?

(a) SBA may initiate an SDB determination whenever it receives credible information calling into the question a firm's eligibility as an SDB, including an adverse determination from a DOT recipient of the firm's status as a DBE. Upon its completion of an SDB determination, SBA will issue a written decision regarding the SDB status of the questioned firm.

(1) If SBA finds that the firm does not qualify as an SDB, SBA will decertify the firm as an SDB, and immediately remove the firm from the list of qualified SDBs. The firm may appeal SBA's decision to OHA consistent with the provisions of § 124.1008(f) and part 134 of this chapter.

(2) If SBA finds that the firm continues to qualify as an SDB, the determination remains in effect for three years from the date of the decision under the same conditions as if the concern had been granted SDB certification under § 124.1008.

(b) An SDB firm must report within 10 days to the AA/SDBCE any changes in ownership and control or any other circumstances which could adversely affect its eligibility as an SDB.

§ 124.1017 Who may protest the disadvantaged status of a concern?

(a) In connection with a requirement for which the apparent successful offeror has invoked an SDB evaluation adjustment or an SDB set-aside, the following entities may protest the disadvantaged status of the apparent successful offeror:

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(1) Any other concern which submitted an offer for that requirement, unless the contracting officer has found the concern to be non-responsive or outside the competitive range, or SBA has previously found the protesting concern to be ineligible for the requirement at issue;

(2) The procuring activity contracting officer; or

(3) SBA.

(b) In connection with an 8(d) sub-contract, or a requirement for which the apparent successful offeror received an evaluation adjustment for proposing one or more SDB subcontractors, the procuring activity contracting officer or SBA may protest the disadvantaged status of a proposed subcontractor. Other interested parties may submit information to the contracting officer or SBA in an effort to persuade the contracting officer or SBA to initiate a protest.

(c) An interested party seeking to protest both the disadvantaged status and size of an apparent successful SDB offeror must submit two separate protests, one as to disadvantaged status pursuant to this subpart, and one as to size pursuant to part 121 of this title. An interested party seeking to protest only size of an apparent successful SDB offeror must submit a size protest to the contracting officer pursuant to part 121.

§ 124.1018 When will SBA not decide an SDB protest?

(a) SBA will not decide a protest as to disadvantaged status of any concern other than the apparent successful offeror.

(b) SBA will not normally consider a post award protest. SBA may consider a post award protest in its discretion where it determines that a protest decision after award would have a practical effect (e.g., where the contracting officer agrees to terminate the contract if the protest is sustained).

(c) SBA will not decide an untimely protest (see § 124.1020(c)).

(d) SBA will not decide a non-specific protest or one that does not present credible evidence that the protested concern's circumstances have materially changed since SBA certified it as an SDB, or that the protested concern's

SDB application contained false or misleading information (see § 124.1021).

(e) An interested party may appeal SBA's dismissal of a protest for lack of specificity, timeliness, or a basis upon which SBA will consider a protest to SBA's Deputy Associate Deputy Administrator for Government Contracting and Minority Enterprise Development (DADA/GC&MED) pursuant to § 124.1024.

§ 124.1019 Who decides disadvantaged status protests?

In response to a protest challenging the disadvantaged status of a concern, the SBA's AA/SDBCE will determine whether the concern is disadvantaged.

§ 124.1020 What procedures apply to disadvantaged status protests?

(a) *General.* The protest procedures described in this section are separate and distinct from those governing size protests and appeals. All protests relating to whether a concern is a "small" business for purposes of any Federal program, including SDB set-asides and SDB evaluation adjustments, must be filed and processed pursuant to part 121 of this title.

(b) *Filing.* (1) All protests challenging the disadvantaged status of a concern with respect to a particular Federal procurement requirement must be submitted in writing to the procuring activity contracting officer, except in cases where the contracting officer or SBA initiates a protest.

(2) Any contracting officer who initiates a protest must submit the protest in writing to SBA in accord with paragraph (c) of this section.

(3) In cases where SBA initiates a protest, the protest must be submitted in writing to the AA/SDBCE and notification provided in accord with § 124.1022(a).

(c) *Timeliness of protest.* (1) *SDB evaluation adjustment and set-aside protests.*

(i) *General.* In order for a protest to be timely, it must be received by the contracting officer prior to the close of business on the fifth day, exclusive of Saturdays, Sundays and legal holidays, after the bid opening date for sealed bids, or after the receipt from the contracting officer of notification of the

identity of the prospective awardee in negotiated acquisitions.

(ii) *Oral protests.* An oral protest relating to an SDB set-aside or SDB evaluation adjustment made to the contracting officer within the allotted 5-day period will be considered a timely protest only if the contracting officer receives a confirming letter postmarked, FAXed, or delivered no later than one calendar day after the date of such oral protest.

(iii) *Protests of contracting officers or SBA.* The time limitations in paragraph (c)(1)(i) of this section do not apply to contracting officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (c)(3) of this section.

(iv) *Untimely protests.* A protest received after the time limits set forth in this paragraph (c)(1) will be dismissed by SBA.

(2) *Section 8(d) protests.* In connection with an 8(d) subcontract, the contracting officer or SBA must submit a protest to the AA/SDBCE prior to the completion of performance by the intended 8(d) subcontractor.

(3) *Premature protests.* A protest in connection with any procurement which is submitted by any person, including the contracting officer, before bid opening or notification of intended award, whichever applies, will be considered premature, and will be returned to the protestor without action. A contracting officer that receives a premature protest must return it to the protestor without submitting it to the SBA.

(d) *Referral to SBA.* (1) Any contracting officer who receives a protest that is not premature must promptly forward it to the SBA's AA/SDBCE, 409 3rd Street, SW, Washington, DC 20416.

(2) A contracting officer's referral of a protest to SBA must contain the following:

(i) The written protest and any accompanying materials;

(ii) The date on which the protest was received by the contracting officer;

(iii) A copy of the protested concern's selfrepresentation as an SDB, and the date of such selfrepresentation; and

(iv) The date of bid opening or the date on which notification of the ap-

parent successful offeror was sent to all unsuccessful offerors, as applicable.

§ 124.1021 What format, degree of specificity, and basis does SBA require to consider an SDB protest?

(a) *Format.* An SDB protest need not be in any specific format in order for SBA to consider it.

(b) *Specificity.* A protest must be sufficiently specific to provide reasonable notice as to all grounds upon which the protested concern's disadvantaged status is challenged.

(1) SBA will dismiss a protest that merely asserts that the protested concern is not disadvantaged, without setting forth specific facts or allegations.

(2) The contracting officer must forward to SBA any non-premature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely.

(c) *Basis.* SBA will consider a protest challenging whether the apparent successful offeror is owned and controlled by one or more socially and economically disadvantaged individuals, including whether one or more of the individuals claiming disadvantaged status is in fact socially or economically disadvantaged, only if the protest presents credible evidence that the firm's circumstances have materially changed since SBA certified it as an SDB, or that the firm's SDB application contained false or misleading information.

§ 124.1022 What will SBA do when it receives an SDB protest?

(a) Upon receipt of a protest challenging the disadvantaged status of a concern, the AA/SDBCE, or designee, will immediately notify the protestor and the contracting officer of the date the protest was received and whether it will be processed or dismissed for lack of timeliness or specificity.

(b) In cases where the protest is timely and sufficiently specific, the AA/SDBCE, or designee, will also immediately advise the protested concern of the protest and forward a copy of it to the protested concern.

(1) The AA/SDBCE, or designee, is authorized to ask the protested concern to provide any or all of the following

information and documentation, completed so as to show the circumstances existing on the date of self-representation: SBA Form 1010A, "Statement of Personal Eligibility" for each individual claiming disadvantaged status; SBA Form 1010B, "Statement of Business Eligibility;" SBA Form 413, "Personal Financial Statement," for each individual claiming disadvantaged status; information as to whether the protested concern, or any of its owners, officers or directors, have applied for admission to or participated in the SBA's 8(a) BD program and if so, the name of the company which applied or participated and the date of the application or entry into the program; business tax returns for the last two completed fiscal years prior to the date of self-representation; personal tax returns for the last two years prior to the date of self-representation for all individuals claiming disadvantaged status, all officers, all directors and for any individual owning at least 10% of the business entity; annual business financial statements for the last two completed fiscal years prior to the date of self-representation; a current monthly or quarterly business financial statement no older than 90 days; articles of incorporation; corporate by-laws; partnership agreements; limited liability company articles of organization; and any other relevant information as to whether the protested concern is disadvantaged.

(2) SBA's disadvantaged status determination need not be limited to consideration only of the issues raised in the protest. SBA may consider other applicable criteria.

(3) Unless the protest presents specific credible information which calls into question the veracity of application or other documents previously submitted to SBA by a current Participant in SBA's 8(a) BD program, SBA will allow the Participant to submit, in lieu of the information specified in paragraph (b)(1) of this section, a sworn affidavit or declaration that circumstances concerning the ownership and control of the business and the disadvantaged status of its principals have not changed since its application or entry into the program or its most recent annual review, and a copy of its

most recently completed annual review.

(i) If the ownership or control of the business or the disadvantaged status of any principals have changed, the protested concern must comply with paragraph (b)(1) of this section.

(ii) An affidavit or declaration may be allowed only if SBA admitted the protested concern to the 8(a) BD program, or conducted an annual review of the protested concern, during the 12month period preceding the date on which SBA receives the protest, and if proceedings to suspend, terminate or early graduate the concern from the 8(a) BD program are not pending.

(c) Within 10 working days of the date that notification of the protest was received from the AA/SDBCE or designee, the protested concern must submit to the AA/SDBCE or designee, by personal delivery, FAX, or mail, the information and documentation requested pursuant to paragraph (b)(1) of this section or the affidavit permitted by paragraph (b)(2) of this section. Materials submitted must be received by the close of business on the 10th working day.

(1) SBA will consider only materials submitted timely, and the late or non-submission of materials needed to make a disadvantaged status determination may result in sustaining the protest.

(2) The burden is on the protested concern to demonstrate its disadvantaged status, whether or not it is currently shown on the list of qualified SDBs.

(3) The protested concern must timely submit to SBA any information it deems relevant to a determination of its disadvantaged status.

§ 124.1023 How does SBA make disadvantaged status determinations in considering an SDB protest?

(a) *General.* The AA/SDBCE, or designee, will determine a protested concern's disadvantaged status within 15 working days after receipt of a protest. If the procuring activity contracting officer does not receive an SBA determination within 15 working days after the SBA's receipt of the protest, the contracting officer may presume that

the challenged offeror is disadvantaged, unless the SBA requests and the contracting officer grants an extension to the 15-day response period.

(b) *Award after protest.* (1) After receiving a protest involving an offeror being considered for award, the contracting officer shall not award the contract until:

(i) The SBA has made an SDB determination, or

(ii) 15 working days have expired since SBA's receipt of a protest and the contracting officer has not agreed to an extension of the 15-day response period.

(2) Notwithstanding paragraph (b)(1) of this section, the contracting officer may award a contract after the receipt of an SDB protest where he or she determines in writing that an award must be made to protect the public interest.

(c) *Withdrawal of protest.* If a protest is withdrawn, SBA will not complete a new disadvantaged status determination, and a previous SDB certification will stand.

(d) *Basis for determination.* (1) Except with respect to a concern which is a current Participant in SBA's 8(a) BD program and is authorized under § 124.1022(b)(3) to submit an affidavit concerning its disadvantaged status, the disadvantaged status determination will be based on the protest record, including reasonable inferences therefrom, as supplied by the protestor, protested concern, SBA or others.

(2) SBA may in its discretion make a part of the protest record information already in its files, and information submitted by the protestor, the protested concern, the contracting officer, or other persons contacted for additional specific information.

(e) *Disadvantaged status.* In evaluating the social and economic disadvantage of individuals claiming disadvantaged status, SBA will consider the same information and factors set forth in §§ 124.103 and 124.104. As provided in § 124.1002(c), individuals claiming disadvantaged status must have a net worth that is less than \$750,000, after taking into account the exclusions set forth in § 124.104(c)(2).

(f) *Disadvantaged status determination.* SBA will render a written determination including the basis for its findings and conclusions.

(g) *Notification of determination.* After making its disadvantaged status determination, the SBA will immediately notify the contracting officer, the protestor, and the protested concern of its determination. SBA will promptly provide by certified mail, return receipt requested, a copy of its written determination to the same entities, consistent with law.

(h) *Results of an SBA disadvantaged status determination.* A disadvantaged status determination becomes effective immediately.

(1) If the concern is found not to be disadvantaged, the determination remains in full force and effect unless reversed upon appeal by SBA's DADA/GC&MED, or designee, pursuant to § 124.1024, or the concern is certified to be an SDB under § 124.1008. The concern is precluded from applying for SDB certification for 12 months from the date of the final agency decision (whether by the AA/SDBCE, or designee, without an appeal, or by the DADA/GC&MED, or designee, on appeal).

(2) If the concern is found to be disadvantaged, the determination remains in full force and effect unless and until reversed upon appeal by SBA's DADA/GC&MED, or designee, pursuant to § 124.1024. A final Agency decision (whether by the AA/SDBCE, or designee, without an appeal, or by the DADA/GC&MED, or designee, on appeal) finding the protested concern to be an SDB remains in effect for three years from the date of the decision under the same conditions as if the concern had been granted SDB certification under § 124.1008.

§ 124.1024 Appeals of disadvantaged status determinations.

(a) *Who may appeal.* Appeals of protest determinations may be filed with the SBA's DADA/GC&MED by the protested concern, the protestor, or the contracting officer.

(b) *Timeliness of appeal.* An appeal must be in writing and must be received by the DADA/GC&MED no later than 5 working days after the date of receipt of the protest determination.

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SBA will dismiss any appeal received after the five-day time period.

(c) *Notice of appeal.* Notice of the appeal must be provided by the party bringing an appeal to the procuring activity contracting officer and either the protested concern or original protestor, as appropriate.

(d) *Grounds for appeal.* SBA will reexamine a protest determination only if there was a clear and significant error in the processing of the protest, or if the AA/SDBCE, or designee, failed to consider a significant material fact contained within the information supplied by the protestor or the protested concern. SBA will not consider protest determination appeals based on additional information or changed circumstances which were not disclosed at the time of the decision of the AA/SDBCE or designee, or which are based on disagreement with the findings and conclusions contained in the determination.

(e) *Contents of appeal.* No specific format is required for the appeal. However, the appeal must identify the protest determination which is appealed, and set forth a full and specific statement as to why the determination is erroneous under paragraph (c) of this section.

(f) *Completion of appeal after award.* An appeal may proceed to completion even though an award of the SDB acquisition or other procurement requirement which prompted the protest has been made, if so desired by the protested concern, or where SBA determines that a decision on appeal would have a material impact on contracting decisions, such as where the contracting officer agrees:

(1) In the case where an award is made to a concern other than the protested concern, to terminate the contract and award to the protested concern if the appeal finds that the protested concern is disadvantaged; or

(2) In the case where an award is made to the protested concern, to terminate the contract if the appeal finds that the protested concern is not disadvantaged.

(g) The appeal will be decided by the DADA/GC&MED, within 5 working days of its receipt, if practicable.

(h) The appeal decision will be based only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protestor, and the protested concern, consistent with law.

(i) The decision of the DADA/GC&MED, is the final decision of the SBA, and cannot be further appealed to OHA.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

Sec.

125.1 Programs included.

125.2 Prime contracting assistance.

125.3 Subcontracting assistance.

125.4 Government property sales assistance.

125.5 Certificate of Competency Program.

125.6 Prime contractor performance requirements (limitations on subcontracting).

125.7 What is the Very Small Business program?

AUTHORITY: 15 U.S.C. 634(b)(6), 637 and 644; 31 U.S.C. 9701, 9702.

SOURCE: 61 FR 3312, Jan. 31, 1996, unless otherwise noted.

§ 125.1 Programs included.

The regulations in this part relate to the Government contracting assistance programs of SBA. There are four main programs: Prime contracting assistance; Subcontracting assistance; Government property sales assistance; and the Certificate of Competency program. The objective of the programs is to assist small businesses in obtaining a fair share of Federal Government contracts, subcontracts, and property sales.

§ 125.2 Prime contracting assistance.

(a) *General.* Small business concerns must receive any award or contract, or any contract for the sale of Government property, that SBA and the procuring or disposal agency determine to be in the interest of:

(1) Maintaining or mobilizing the Nation's full productive capacity;

(2) War or national defense programs;

(3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for

the Government in each industry category are placed with small business concerns; or

(4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.

(b) *PCR and procuring activity responsibilities.* (1) SBA Procurement Center Representatives (PCRs) are generally located at Federal agencies and buying activities which have major contracting programs. PCRs review all acquisitions not set-aside for small businesses to determine whether a set-aside is appropriate.

(2) A procuring activity must provide a copy of a proposed acquisition strategy (e.g., Department of Defense Form 2579, or equivalent) to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) at least 30 days prior to a solicitation's issuance whenever a proposed acquisition strategy:

(i) Includes in its description goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely;

(ii) Seeks to package or consolidate discrete construction projects; or

(iii) Meets the definition of a bundled requirement as defined in paragraph (d)(1)(i) of this section.

(3) Whenever any of the circumstances identified in paragraph (b)(2) of this section exist, the procuring activity must also submit to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) a written statement explaining why:

(i) If the proposed acquisition strategy involves a bundled requirement, the procuring activity believes that the bundled requirement is necessary and justified under the analysis required by paragraph (d)(3)(iii) of this section; or

(ii) If the description of the requirement includes goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the pro-

posed procurement would render small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects:

(A) The proposed acquisition cannot be divided into reasonably small lots to permit offers on quantities less than the total requirement;

(B) Delivery schedules cannot be established on a basis that will encourage small business participation;

(C) The proposed acquisition cannot be offered so as to make small business participation likely; or

(D) Construction cannot be procured as separate discrete projects.

(4) In conjunction with their duties to promote the set-aside of procurements for small business, PCRs will identify small businesses that are capable of performing particular requirements, including teams of small business concerns for larger or bundled requirements (see § 121.103(f)(3) of this chapter).

(5)(i) If a PCR believes that a proposed procurement will render small business prime contract participation unlikely, or if a PCR does not believe a bundled requirement to be necessary and justified, the PCR shall recommend to the procurement activity alternative procurement methods which would increase small business prime contract participation. Such alternatives may include:

(A) Breaking up the procurement into smaller discrete procurements;

(B) Breaking out one or more discrete components, for which a small business set-aside may be appropriate; and

(C) Reserving one or more awards for small companies when issuing multiple awards under task order contracts.

(i) Where bundling is necessary and justified, the PCR will work with the procuring activity to tailor a strategy that preserves small business prime contract participation to the maximum extent practicable.

(ii) The PCR will also work to ensure that small business participation is maximized through subcontracting opportunities. This may include:

(A) Recommending that the solicitation and resultant contract specifically

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state the small business subcontracting goals which are expected of the contractor awardee; and

(B) Recommending that the small business subcontracting goals be based on total contract dollars instead of subcontract dollars.

(6) In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, whether or not the acquisition is a bundled or substantially bundled requirement within the meaning of paragraph (d) of this section, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the matter to the secretary of the department or head of the agency. The time limits for such appeals are set forth in 19.505 of the Federal Acquisition Regulation (FAR) (48 CFR 19.505).

(7) PCRs will work with a procuring activity's Small Business Specialist (SBS) to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by small businesses, including small business contract teams, as prime contractors. If small business participation as prime contractors appears unlikely, the SBS and PCR will facilitate small business participation as subcontractors or suppliers.

(c) *BPCR responsibilities.* (1) SBA is required by section 403 of Public Law 98-577 (15 U.S.C. 644(l)) to assign a breakout PCR (BPCR) to major contracting centers. A major contracting center is a center that, as determined by SBA, purchases substantial dollar amounts of other than commercial items, and which has the potential to achieve significant savings as a result of the assignment of a BPCR.

(2) BPCRs advocate full and open competition in the Federal contracting process and recommend the breakout for competition of items and requirements which previously have not been competed. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with

the appeal procedures set forth in § 19.505 of the FAR (48 CFR 19.505). BPCRs also review restrictions and obstacles to competition and make recommendations for improvement. Other authorized functions of a BPCR are set forth in 48 CFR 19.403(c) of the FAR and Section 15(l) of the Act (15 U.S.C. 644(l)).

(d) Contract bundling—(1) Definitions—(i) Bundled requirement or bundling. The term “bundled requirement or bundling” refers to the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small business concern due to:

(A) The diversity, size, or specialized nature of the elements of the performance specified;

(B) The aggregate dollar value of the anticipated award;

(C) The geographical dispersion of the contract performance sites; or

(D) Any combination of the factors described in paragraphs (d)(1)(i) (A), (B), and (C).

(ii) *Separate smaller contract:* A separate smaller contract is a contract that has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns.

(iii) *Substantial bundling:* Substantial bundling is any contract consolidation, which results in an award whose average annual value is \$10 million or more.

(2) *Requirement to foster small business participation:* The Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors, subcontractors, and suppliers in the contracting opportunities of the Government. To comply with this requirement, agency acquisition planners must:

(i) Structure procurement requirements to facilitate competition by and among small business concerns, including small disadvantaged, 8(a) and women-owned business concerns; and

(ii) Avoid unnecessary and unjustified bundling of contract requirements

that inhibits or precludes small business participation in procurements as prime contractors.

(3) *Requirement for market research.* (i) In addition to the requirements of paragraph (b)(2) of this section and before proceeding with an acquisition strategy that could lead to a contract containing bundled or substantially bundled requirements, an agency must conduct market research to determine whether bundling of the requirements is necessary and justified. During the market research phase, the acquisition team should consult with the applicable PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(ii) The procuring activity must notify each small business which is performing a contract that it intends to consolidate that requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the small business the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(iii) When the procuring activity intends to proceed with an acquisition involving bundled or substantially bundled procurement requirements, it must document the acquisition strategy to include a determination that the bundling is necessary and justified, when compared to the benefits that could be derived from meeting the agency's requirements through separate smaller contracts.

(A) The procuring activity may determine a consolidated requirement to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not consolidated, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits may include cost savings and/or price reduc-

tion, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to:

(1) Benefits equivalent to 10 percent if the contract value (including options) is \$75 million or less; or

(2) Benefits equivalent to 5 percent if the contract value (including options) is over \$75 million.

(B) Notwithstanding paragraph (d)(3)(iii)(A) of this section, the Assistant Secretaries with responsibility for acquisition matters (Service Acquisition Executives) or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis determine that a consolidated requirement is necessary and justified when:

(1) There are benefits that do not meet the thresholds set forth in paragraph (d)(3)(iii)(A) of this section but, in the aggregate, are critical to the agency's mission success; and

(2) Procurement strategy provides for maximum practicable participation by small business.

(C) Notwithstanding paragraph (d)(3)(iii)(A) and (B) of this section, a consolidated requirement is necessary and justified when it is subject to the cost comparison conducted in accordance with OMB Circular A-76.

(D) The reduction of administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the administrative or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be consolidated (including options). To be substantial, such cost savings must be at least 10 percent of the contract value (including options).

(E) In assessing whether cost savings and/or a price reduction would be achieved through bundling, the procuring activity and SBA must compare the price that has been charged by small businesses for the work that they have performed and, where available, the price that could have been or could

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be charged by small businesses for the work not previously performed by small business.

(4) *Substantial bundling.* Where a proposed procurement strategy involves a substantial bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed bundled contract justify its use, and must include, at a minimum:

(i) The analysis for bundled requirements set forth in paragraph (d)(3)(iii) of this section;

(ii) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(iii) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement; and

(iv) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements.

(5) *Significant subcontracting opportunity.* (i) Where a bundled or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the following factors as significant factors in evaluating offers:

(A) A factor that is based on the rate of participation provided under the subcontracting plan for small business in the performance of the contract; and

(B) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(ii) Where the offeror for such a bundled contract qualifies as a small business concern, the procuring agency must give to the offeror the highest score possible for the evaluation fac-

tors identified in paragraph (d)(5)(i) of this section.

[61 FR 3312, Jan. 31, 1996, as amended at 63 FR 31908, June 11, 1998; 64 FR 57370, Oct. 25, 1999]

§ 125.3 Subcontracting assistance.

(a) The purpose of the subcontracting assistance program is to achieve maximum utilization of small business by major prime contractors. The Act requires other-than-small firms awarded contracts that offer subcontracting possibilities by the Federal Government in excess of \$500,000, or \$1 million for construction of a public facility, to submit a subcontracting plan to the contracting agency. The FAR sets forth the requirements for subcontracting plans in 48 CFR part 19, subpart 19.7, and 48 CFR 52.219-9.

(b) Upon determination of the successful subcontract offeror on a subcontract for which a small business, small disadvantaged business, and/or a HUBZone small business received a preference, but prior to award, the prime contractor must inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror and if the successful offeror was a small business, small disadvantaged business, or HUBZone business. This applies to all subcontracts over \$10,000.

(c) SBA Commercial Market Representatives (CMRs) facilitate the process of matching large prime contractors with small, small disadvantaged, and HUBZone subcontractors. CMRs identify, develop, and market small businesses to the prime contractors and assist the small concerns in obtaining subcontracts.

(d) Each CMR has a portfolio of prime contractors and conducts periodic compliance reviews and needs assessments of the companies in this portfolio. CMRs are also required to perform opportunity development and source identification. Opportunity development means assessing the current and future needs of the prime contractors. Source identification means identifying those small, small disadvantaged, and HUBZone concerns which

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can fulfill the needs assessed from the opportunity development process.

[61 FR 3312, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996, as amended at 63 FR 31908, June 11, 1998]

§ 125.4 Government property sales assistance.

(a) The purpose of SBA's Government property sales assistance program is to:

(1) Insure that small businesses obtain their fair share of all Federal real and personal property qualifying for sale or other competitive disposal action; and

(2) Assist small businesses in obtaining Federal property being processed for disposal, sale, or lease.

(b) SBA property sales assistance primarily consists of two activities:

(1) Obtaining small business set-asides when necessary to insure that a fair share of Government property sales are made to small businesses; and

(2) Providing advice and assistance to small businesses on all matters pertaining to sale or lease of Government property.

(c) The program is intended to cover the following categories of Government property:

(1) Sales of timber and related forest products;

(2) Sales of strategic material from national stockpiles;

(3) Sales of royalty oil by the Department of Interior's Minerals Management Service;

(4) Leases involving rights to minerals, petroleum, coal, and vegetation; and

(5) Sales of surplus real and personal property.

(d) SBA has established specific small business size standards and rules for the sale or lease of the different kinds of Government property. These provisions are contained in §§ 121.501 through 121.514 of this chapter.

§ 125.5 Certificate of Competency Program.

(a) *General.* (1) The Certificate of Competency (COC) Program is authorized under section 8(b)(7) of the Small Business Act. A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business

concerns possess the responsibility to perform a specific Government procurement (or sale) contract. The COC Program is applicable to all Government procurement actions. For purposes of this Section, the term "United States" includes its territories, possessions, and the Commonwealth of Puerto Rico.

(2) A contracting officer must, upon determining an apparent low small business offeror to be nonresponsible, refer that small business to SBA for a possible COC, even if the next low apparently responsible offeror is also a small business.

(3) A small business offeror referred to SBA as nonresponsible may apply to SBA for a COC. Where the applicant is a non-manufacturing offeror on a supply contract, the COC applies to the responsibility of the non-manufacturer, not to that of the manufacturer.

(b) *COC Eligibility.* (1) The offeror seeking a COC has the burden of proof to demonstrate its eligibility for COC review. To be eligible for the COC program, a firm must meet the following criteria:

(i) It must qualify as a small business concern under the size standard applicable to the procurement. Where the solicitation fails to specify a size standard or Standard Industrial Classification (SIC) code, SBA will assign the appropriate size standard to determine COC eligibility. SBA determines size eligibility as of the date described in § 121.404 of this chapter.

(ii) A manufacturing, service, or construction concern must demonstrate that it will perform a significant portion of the proposed contract with its own facilities, equipment, and personnel. The contract must be performed or the end item manufactured within the United States.

(iii) A non-manufacturer making an offer on a small business set-aside contract for supplies must furnish end items that have been manufactured in the United States by a small business. A waiver of this requirement may be requested under §§ 121.1301 through 121.1305 of this chapter for either the type of product being procured or the specific contract at issue.

(iv) A non-manufacturer making an offer on an unrestricted procurement

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or a procurement utilizing simplified acquisition threshold procedures with a cost that does not exceed \$25,000 must furnish end items manufactured in the United States to be eligible for a COC.

(v) An offeror intending to provide a kit consisting of finished components or other components provided for a special purpose, is eligible if:

(A) It meets the Size Standard for the SIC code assigned to the procurement;

(B) Each component comprising the kit was manufactured in the United States; and

(C) In the case of a set-aside, each component comprising the kit was manufactured by a small business under the size standard applicable to the component provided. A waiver of this requirement may be requested under §§ 121.1301 through 121.1305 of this chapter.

(2) SBA will determine a concern ineligible for a COC if the concern, or any of its principals, appears in the "Parties Excluded From Federal Procurement Programs" section found in the U.S. General Services Administration Office of Acquisition Policy Publication: List of Parties Excluded From Federal Procurement or Nonprocurement Programs. If a principal is unable to presently control the applicant concern, and appears in the Procurement section of the list due to matters not directly related to the concern itself, responsibility will be determined in accordance with paragraph (f)(2) of this section.

(3) An eligibility determination will be made on a case-by-case basis, where a concern or any of its principals appears in the Nonprocurement Section of the publication referred to in paragraph (b)(2) of this section.

(c) *Referral of nonresponsibility determination to SBA.* (1) A contracting officer who determines that an apparently successful offeror that has certified itself to be a small business with respect to a specific Government procurement lacks any element of responsibility (including competency, capability, capacity, credit, integrity or tenacity or perseverance) must refer the matter in writing to the SBA Government Contracting Area Office (Area Office) serving the area in which the

headquarters of the offeror is located. The referral must include a copy of the following:

(i) Solicitation;

(ii) Offer submitted by the concern whose responsibility is at issue for the procurement (its Best and Final Offer for a negotiated procurement);

(iii) Abstract of Bids, where applicable, or the Contracting Officer's Price Negotiation Memorandum;

(iv) Preaward survey, where applicable;

(v) Contracting officer's written determination of nonresponsibility;

(vi) Technical data package (including drawings, specifications, and Statement of Work); and

(vii) Any other justification and documentation used to arrive at the nonresponsibility determination.

(2) Contract award must be withheld by the contracting officer for a period of 15 working days (or longer if agreed to by SBA and the contracting officer) following receipt by the appropriate Area Office of a referral which includes all required documentation.

(3) The COC referral must indicate that the offeror has been found responsive to the solicitation, and also identify the reasons for the nonresponsibility determination.

(d) *Application for COC.* (1) Upon receipt of the contracting officer's referral, the Area Office will inform the concern of the contracting officer's negative responsibility determination, and offer it the opportunity to apply to SBA for a COC by a specified date.

(2) The COC application must include all information and documentation requested by SBA and any additional information which the firm believes will demonstrate its ability to perform on the proposed contract. The application should be returned as soon as possible, but no later than the date specified by SBA.

(3) Upon receipt of a complete and acceptable application, SBA may elect to visit the applicant's facility to review its responsibility. SBA personnel may obtain clarification or confirmation of information provided by the applicant by directly contacting suppliers, financial institutions, and other third parties upon whom the applicant's responsibility depends.

(e) *Incomplete applications.* If an application for a COC is materially incomplete or is not submitted by the date specified by SBA, SBA will close the case without issuing a COC and will notify the contracting officer and the concern with a declination letter.

(f) *Reviewing an application.* (1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer. SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but it may presume responsibility exists as to elements other than those cited as deficient. SBA may deny a COC for reasons of nonresponsibility not originally cited by the contracting officer.

(2) A small business will be rebuttably presumed nonresponsible if any of the following circumstances are shown to exist:

(i) Within three years before the application for a COC, the concern, or

any of its principals, has been convicted of an offense or offenses that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part 9, subpart 9.4), and the matter is still under the jurisdiction of a court (e.g., the principals of a concern are incarcerated, on probation or parole, or under a suspended sentence); or

(ii) Within three years before the application for a COC, the concern or any of its principals has had a civil judgment entered against it or them for any reason that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part, subpart 9.4).

(g) *Decision by Area Director (“Director”).* After reviewing the information submitted by the applicant and the information gathered by SBA, the Area Director will make a determination, either final or recommended as set forth in the following chart:

| Contracting actions | SBA official or office with authority to make decision | Finality of decision; options for contracting agencies |
|---|---|--|
| \$100,000 or less, or in accordance with Simplified Acquisition Threshold procedures. | Director may approve or deny | Final. The Director will notify both applicant and contracting agency in writing of the decision. |
| Between \$100,000 and \$25 million | (1) Director may deny (2) Director may approve, subject to right of appeal and other options. | (1) Final. (2) Contracting agency may proceed under paragraph (h) or paragraph (i) of this section. |
| Exceeding \$25 million | (1) Director may deny (2) Director must refer to SBA Headquarters recommendation for approval. | (1) Final. (2) Contracting agency may proceed under paragraph (j) of this section. |

(h) *Notification of intent to issue on a contract with a value between \$100,000 and \$25 million.* Where the Director determines that a COC is warranted, he or she will notify the contracting officer of the intent to issue a COC, and of the reasons for that decision, prior to issuing the COC. At the time of notification, the contracting officer has the following options:

(1) Accept the Director's decision to issue the COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale of the decision; or

(2) Ask the Director to suspend the case for one of the following purposes:

(i) To forward a detailed rationale for the decision to the contracting officer

for review within a specified period of time;

(ii) To afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file;

(iii) To submit any information which the contracting officer believes SBA has not considered (at which time, SBA will establish a new suspense date mutually agreeable to the contracting officer and SBA); or

(iv) To permit resolution of an appeal by the contracting agency to SBA Headquarters under paragraph (i) of this section.

(i) *Appeals of Area Director determinations.* For COC actions with a value exceeding \$100,000, contracting agencies may appeal a Director's decision to issue a COC to SBA Headquarters by

filing an appeal with the Area Office processing the COC application. The Area Office must honor the request to appeal if the contracting officer agrees to withhold award until the appeal process is concluded. Without such an agreement from the contracting officer, the Director must issue the COC. When such an agreement has been obtained, the Area Office will immediately forward the case file to SBA Headquarters.

(1) The intent of the appeal procedure is to allow the contracting agency the opportunity to submit to SBA Headquarters any documentation which the Area Office may not have considered.

(2) SBA Headquarters will furnish written notice to the Director, Office of Small and Disadvantaged Business Utilization (OSDBU) at the secretariat level of the procuring agency (with a copy to the contracting officer), that the case file has been received and that an appeal decision may be requested by an authorized official at that level. If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its Director, OSDBU, within 10 working days (or a time period agreed upon by both agencies) of its receipt of the notice under paragraph (h) of this section. The appeal and any supporting documentation must be filed within 10 working days (or a different time period agreed to by both agencies) after SBA receives the request for a formal appeal.

(3) The SBA Associate Administrator for Government Contracting (AA/GC) will make a final determination, in writing, to issue or to deny the COC.

(j) *Decision by SBA Headquarters where contract value exceeds \$25 million.* (1) Prior to taking final action, SBA Headquarters will contact the contracting agency at the secretariat level or agency equivalent and afford it the following options:

(i) Ask SBA Headquarters to suspend the case so that the agency can meet with Headquarters personnel and review all documentation contained in the case file; or

(ii) Submit to SBA Headquarters for evaluation any information which the contracting agency believes has not been considered.

(2) After reviewing all available information, the AA/GC will make a final decision to either issue or deny the COC. If the AA/GC's decision is to deny the COC, the applicant and contracting agency will be informed in writing by the Area Office. If the decision is to issue the COC, a letter certifying the responsibility of the firm will be sent to the contracting agency by Headquarters and the applicant will be informed of such issuance by the Area Office. Except as set forth in paragraph (l) of this section, there can be no further appeal or reconsideration of the decision of the AA/GC.

(k) *Notification of denial of COC.* The notification to an unsuccessful applicant following either an Area Director or a Headquarters denial of a COC will briefly state all reasons for denial and inform the applicant that a meeting may be requested with appropriate SBA personnel to discuss the denial. Upon receipt of a request for such a meeting, the appropriate SBA personnel will confer with the applicant and explain the reasons for SBA's action. The meeting does not constitute an opportunity to rebut the merits of the SBA's decision to deny the COC, and is for the sole purpose of giving the applicant the opportunity to correct deficiencies so as to improve its ability to obtain future contracts either directly or, if necessary, through the issuance of a COC.

(l) *Reconsideration of COC after issuance.* (1) An approved COC may be reconsidered and possibly rescinded, at the sole discretion of SBA, where an award of the contract has not occurred, and one of the following circumstances exists:

(i) The COC applicant submitted false or omitted materially adverse information;

(ii) New materially adverse information has been received relating to the current responsibility of the applicant concern; or

(iii) The COC has been issued for more than 60 days (in which case SBA may investigate the firm's current circumstances).

(2) Where SBA reconsiders and reaffirms the COC the procedures under paragraph (h) of this section do not apply.

(m) *Effect of a COC.* By the terms of the Act, a COC is conclusive as to responsibility. Where SBA issues a COC on behalf of a small business with respect to a particular contract, contracting officers are required to award the contract without requiring the firm to meet any other requirement with respect to responsibility.

(n) *Effect of Denial of COC.* Denial of a COC by SBA does not preclude a contracting officer from awarding a contract to the referred firm, nor does it prevent the concern from making an offer on any other procurement.

(o) *Monitoring performance.* Once a COC has been issued and a contract awarded on that basis, SBA will monitor contractor performance.

[61 FR 3312, Jan. 31, 1996; 61 FR 7987, Mar. 1, 1996]

§ 125.6 Prime contractor performance requirements (limitations on subcontracting).

(a) In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, or an unrestricted procurement where a concern has claimed a 10 percent small disadvantaged business (SDB) price evaluation preference, a small business concern must agree that:

(1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.

(2) In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials).

(3) In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials).

(4) In the case of a contract for construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials).

(b) *Definitions.* The following definitions apply to this section:

(1) *Cost of the contract.* All allowable direct and indirect costs allocable to the contract, excluding profit or fees.

(2) *Cost of contract performance incurred for personnel.* Direct labor costs and any overhead which has only direct labor as its base, plus the concern's General and Administrative rate multiplied by the labor cost.

(3) *Cost of manufacturing.* Those costs incurred by the firm in the production of the end item being acquired. These are costs associated with the manufacturing process, including the direct costs of fabrication, assembly, or other production activities, and indirect costs which are allocable and allowable. The cost of materials, as well as the profit or fee from the contract, are excluded.

(4) *Cost of materials.* Includes costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), off-the-shelf items (and similar proportionately high-cost common supply items requiring additional manufacturing or incorporation to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, the acquisition of services or products from outside sources following normal commercial practices within the industry are also included.

(5) *Off-the-shelf item.* An item produced and placed in stock by a manufacturer, or stocked by a distributor, before orders or contracts are received for its sale. The item may be commercial or may be produced to military or Federal specifications or description. Off-the-shelf items are also known as Nondevelopmental Items (NDI).

(6) *Personnel.* Individuals who are "employees" under § 121.106 of this chapter.

(7) *Subcontracting.* That portion of the contract performed by a firm, other than the concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available off-the-shelf, and which are manufactured in accordance with drawings, specifications, or designs furnished by the contractor, or

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by the government as a portion of the solicitation. Raw castings, forgings, and moldings are considered as materials, not as subcontracting costs. Where the prime contractor has been directed by the Government to use any specific source for parts, supplies, components subassemblies or services, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.

(c) Compliance will be considered an element of responsibility and not a component of size eligibility.

(d) The period of time used to determine compliance will be the period of performance which the evaluating agency uses to evaluate the proposal or bid. If the evaluating agency fails to articulate in its solicitation the period of performance it will use to evaluate the proposal or bid, the base contract period, excluding options, will be used to determine compliance. In indefinite quantity contracts, performance over the guaranteed minimum will be used to determine compliance unless the evaluating agency articulates a different period of performance which it will use to evaluate the proposal or bid in its solicitation.

(e) Work to be performed by subsidiaries or other affiliates of a concern is not counted as being performed by the concern for purposes of determining whether the concern will perform the required percentage of work.

(f) The procedures of § 125.5 apply where the contracting officer determines non-compliance, the procurement is a full or partial small business set-aside or an SDB has claimed a preference, and refers the matter to SBA for a COC determination.

(g) Where an offeror is exempt from affiliation under § 121.103(f)(3) of this chapter and qualifies as a small business concern, the performance of work requirements set forth in this section apply to the cooperative effort of the team or joint venture, not its individual members.

[61 FR 3312, Jan. 31, 1996; 61 FR 39305, July 20, 1996; as amended at 64 FR 57372, Oct. 25, 1999]

§ 125.7 What is the Very Small Business program?

(a) The Very Small Business (VSB) program is an extension of the small

business set-aside program, administered by SBA as a pilot to increase opportunities for VSB concerns. Procurement requirements, including construction requirements, estimated to be between \$2,500 and \$50,000 must be reserved for eligible VSB concerns if the criteria in paragraph (c) of this section are met.

(b) *Definitions.* (1) The term *designated SBA district* means the geographic area served by any of the following SBA district offices:

(i) Albuquerque, NM, serving New Mexico;

(ii) Los Angeles, CA, serving the following counties in California: Los Angeles, Santa Barbara, and Ventura;

(iii) Boston, MA, serving Massachusetts;

(iv) Louisville, KY, serving Kentucky;

(v) Columbus, OH, serving the following counties in Ohio: Adams, Allen, Ashland, Athens, Auglaize, Belmont, Brown, Butler, Champaign, Clark, Clermont, Clinton, Coshocton, Crawford, Darke, Delaware, Fairfield, Fayette, Franklin, Gallia, Greene, Guernsey, Hamilton, Hancock, Hardin, Highland, Hocking, Holmes, Jackson, Knox, Lawrence, Licking, Logan, Madison, Marion, Meigs, Mercer, Miami, Monroe, Montgomery, Morgan, Morrow, Muskingum, Noble, Paulding, Perry, Pickaway, Pike, Preble, Putnam, Richland, Ross, Scioto, Shelby, Union, Van Wert, Vinton, Warren, Washington, and Wyandot;

(vi) New Orleans, LA, serving Louisiana;

(vii) Detroit, MI, serving Michigan;

(viii) Philadelphia, PA, serving the State of Delaware and the following counties in Pennsylvania: Adams, Berks, Bradford, Bucks, Carbon, Chester, Clinton, Columbia, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Mifflin, Monroe, Montgomery, Montour, Northampton, Northumberland, Philadelphia, Perry, Pike, Potter, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York;

(ix) El Paso, TX, serving the following counties in Texas: Brewster, Culberson, El Paso, Hudspeth, Jeff

Davis, Pecos, Presidio, Reeves, and Terrell; and

(x) Santa Ana, CA, serving the following counties in California: Orange, Riverside, and San Bernadino.

(2) The term *very small business* or *VSB* means a concern whose headquarters is located within the geographic area served by a designated SBA district and, together with its affiliates, has no more than 15 employees and has average annual receipts that do not exceed \$1 million. The terms *concerns*, *affiliates*, *average annual receipts*, and *employees* have the meaning given to them in §§121.105, 121.103, 121.104, and 121.106, respectively, of this chapter.

(c)(1) A contracting officer must set aside for VSB concerns each procurement that has an anticipated dollar value between \$2,500 and \$50,000 if:

(i) In the case of a procurement for manufactured or supply items:

(A) The buying activity is located within the geographical area served by a designated SBA district, and

(B) There is a reasonable expectation of obtaining offers from two or more responsible VSB concerns headquartered within the geographical area served by that designated SBA district that are competitive in terms of market prices, quality and delivery; or

(ii) In the case of a procurement for other than manufactured or supply items:

(A) The requirement will be performed within the geographical area served by a designated SBA district, and

(B) There is a reasonable expectation of obtaining offers from two or more responsible VSB concerns headquartered within the geographical area served by that designated SBA district that are competitive in terms of market prices, quality and delivery.

(2) The geographic areas served by the SBA Los Angeles and Santa Ana District Offices will be treated as one designated SBA district for the purposes of this section.

(3) If the contracting officer determines that there is not a reasonable expectation of receiving at least two responsible offers from VSB concerns

headquartered within the geographic area served by the applicable designated SBA district, he or she must include in the contract file the reason(s) for this determination, and solicit the procurement pursuant to the provisions of 48 CFR 19.502–2. SBA may appeal such determination using the same procedure described in 48 CFR 19.505.

(4) If the contracting officer receives only one acceptable offer from a responsible VSB concern in response to a VSB set-aside, the contracting officer will make an award to that firm. If the contracting officer receives no acceptable offers from responsible VSB concerns, he or she will withdraw the procurement and, if still valid, must resolicit it pursuant to the provisions of 48 CFR 19.502–2.

(d) Where a procurement is set aside for VSB concerns, only those VSB concerns whose headquarters are located within the geographic area served by the applicable designated SBA district are eligible to submit offers in response to the solicitation.

(e) Nothing in this section shall be construed to alter in any way the procedures by which procuring activities award contracts under the SBA's 8(a) Business Development program (see 13 CFR part 124).

(f) This pilot program terminates on September 30, 2000. Any award under this program must be made on or before this date.

[63 FR 46642, Sept. 2, 1998]

PART 126—HUBZONE PROGRAM

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Sec.

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AUTHORITY: Pub. L. 105–135 sec. 601 *et seq.*, 111 Stat. 2592; 15 U.S.C. 632(a).

SOURCE: 63 FR 31908, June 11, 1998, unless otherwise noted.

Subpart A—Provisions of General Applicability

§ 126.100 What is the purpose of the HUBZone program?

The purpose of the HUBZone program is to provide federal contracting assistance for qualified SBCs located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas.

§ 126.101 Which government departments or agencies are affected directly by the HUBZone program?

(a) Until September 30, 2000, the HUBZone program applies only to procurements by the following departments and agencies:

- (1) Department of Agriculture;
- (2) Department of Defense;
- (3) Department of Energy;
- (4) Department of Health and Human Services;
- (5) Department of Housing and Urban Development;
- (6) Department of Transportation;
- (7) Department of Veterans Affairs;
- (8) Environmental Protection Agency;
- (9) General Services Administration; and
- (10) National Aeronautics and Space Administration.

(b) After September 30, 2000, the HUBZone program will apply to all federal departments and agencies which employ one or more contracting officers as defined by 41 U.S.C. 423(f)(5).

§ 126.102 What is the effect of the HUBZone program on the section 8(d) subcontracting program?

The HUBZone Act of 1997 amended the section 8(d) subcontracting program to include qualified HUBZone SBCs in the formal subcontracting plans described in § 125.3 of this title.

§ 126.103 What definitions are important in the HUBZone program?

Administrator means the Administrator of the United States Small Business Administration (SBA).

AA/8(a)BD means SBA's Associate Administrator for 8(a) Business Development.

AA/HUB means SBA's Associate Administrator for the HUBZone Program.

ADA/GC&8(a)BD means SBA's Associate Deputy Administrator for Government Contracting and 8(a) Business Development.

Certify means the process by which SBA determines that a HUBZone SBC is qualified for the HUBZone program and entitled to be included in SBA's "List of Qualified HUBZone SBCs."

Citizen means a person born or naturalized in the United States. SBA does not consider holders of permanent visas and resident aliens to be citizens.

Concern means a firm which satisfies the requirements in §§ 121.105(a) and (b) of this title.

Contract opportunity means a situation in which a requirement for a procurement exists, none of the exclusions from § 126.605 applies, and any applicable conditions in § 126.607 are met.

County means the political subdivisions recognized as a county by a state or commonwealth or which is an equivalent political subdivision such as a parish, borough, independent city, or *municipio*, where such subdivisions are not subdivisions within counties.

County unemployment rate is the rate of unemployment for a county based on the most recent data available from the United States Department of Labor, Bureau of Labor Statistics. The appropriate data may be found in the

DOL/BLS publication titled "Supplement 2, Unemployment in States and Local Areas." This publication is available for public inspection at the Department of Labor, Bureau of Labor Statistics, Division of Local Area Unemployment Statistics located at 2 Massachusetts Ave., NE, Room 4675, Washington D.C. 20212. A copy is also available at SBA, Office of AA/HUB, 409 3rd Street, SW, Washington D.C. 20416.

De-certify means the process by which SBA determines that a concern is no longer a qualified HUBZone SBC and removes that concern from its List.

Employee means a person (or persons) employed by a HUBZone SBC on a full-time (or full-time equivalent), permanent basis. Full-time equivalent includes employees who work 30 hours per week or more. Full-time equivalent also includes the aggregate of employees who work less than 30 hours a week, where the work hours of such employees add up to at least a 40 hour work week. The totality of the circumstances, including factors relevant for tax purposes, will determine whether persons are employees of a concern. Temporary employees, independent contractors or leased employees are not employees for these purposes.

Example 1: 4 employees each work 20 hours per week; SBA will regard that circumstance as 2 full-time equivalent employees.

Example 2: 1 employee works 20 hours per week and 1 employee works 15 hours per week; SBA will regard that circumstance as not a full-time equivalent.

Example 3: 1 employee works 15 hours per week, 1 employee works 10 hours per week, and 1 employee works 20 hours per week; SBA will regard that circumstance as 1 full-time equivalent employee.

Example 4: 1 employee works 30 hours per week and 2 employees each work 15 hours per week; SBA will regard that circumstance as 1 full-time equivalent employee.

HUBZone means a historically underutilized business zone, which is an area located within one or more qualified census tracts, qualified non-metropolitan counties, or lands within the external boundaries of an Indian reservation.

See other definitions in this section for further details.

HUBZone small business concern (HUBZone SBC) means a concern that is small as defined by § 126.203, is exclusively owned and controlled by persons who are United States citizens, and has its principal office located in a HUBZone.

HUBZone 8(a) concern means a concern that is certified as an 8(a) program participant and which is also a qualified HUBZone SBC.

Indian reservation has the meaning used by the Bureau of Indian Affairs in 25 CFR 151.2(f). This definition refers generally to land over which a "tribe" has jurisdiction, and "tribe" includes Alaska Native entities under 25 CFR 81.1(w).

Interested party means any concern that submits an offer for a specific HUBZone sole source or set-aside contract, any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone SBC, the contracting activity's contracting officer, or SBA.

Lands within the external boundaries of an Indian reservation includes all lands within the outside perimeter of an Indian reservation, whether tribally owned and governed or not. For example, land that is individually owned and located within the outside perimeter of an Indian reservation is "lands within the external boundaries of an Indian reservation." By contrast, an Indian-owned parcel of land that is located outside the perimeter of an Indian reservation is not "lands within the external boundaries of an Indian reservation."

List refers to the database of qualified HUBZone SBCs that SBA has certified.

Median household income has the meaning used by the Bureau of the Census, United States Department of Commerce, in its publication titled, "1990 Census of Population, Social and Economic Characteristics," Report Number CP-2, pages B-14 and B-17. This publication is available for inspection at any local Federal Depository Library. For the location of a Federal Depository library, call toll-free (888)

293–6498 or contact the Bureau of the Census, Income Statistics Branch, Housing and Economic Statistics Division, Washington D.C. 20233–8500.

Metropolitan statistical area means an area as defined in section 143(k)(2)(B) of the Internal Revenue Code of 1986, (Title 26 of the United States Code).

Non-metropolitan has the meaning used by the Bureau of the Census, United States Department of Commerce, in its publication titled, “1990 Census of Population, Social and Economic Characteristics,” Report Number CP–2, page A–9. This publication is available for inspection at any local Federal Depository Library. For the location of a Federal Depository Library, call toll-free (888) 293–6498 or contact the Bureau of the Census, Population Distribution Branch, Population Division, Washington D.C. 20233–8800.

Person means a natural person. Pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1626(e), Alaska Native Corporations and any direct or indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation are deemed to be owned and controlled by Natives, and are thus persons.

Principal office means the location where the greatest number of the concern’s employees at any one location perform their work.

Qualified census tract has the meaning given that term in section 42(d)(5)(C)(ii)(I) of the Internal Revenue Code (Title 26 of the United States Code).

Qualified HUBZone SBC means a HUBZone SBC that SBA certifies as qualified for federal contracting assistance under the HUBZone program.

Qualified non-metropolitan county means any county that:

- (1) Based on the most recent data available from the Bureau of the Census of the Department of Commerce—
 - (i) Is not located in a metropolitan statistical area; and
 - (ii) In which the median household income is less than 80 percent of the non-metropolitan State median household income; or
- (2) Based on the most recent data available from the Secretary of Labor, has an unemployment rate that is not less than 140 percent of the statewide

average unemployment rate for the State in which the county is located.

Reside means to live in a primary residence at a place for at least 180 days, or as a currently registered voter, and with intent to live there indefinitely.

Small disadvantaged business (SDB) means a concern that is small pursuant to part 121 of this title, and is owned and controlled by socially and economically disadvantaged individuals, tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations.

Statewide average unemployment rate is the rate based on the most recent data available from the Bureau of Labor Statistics, United States Department of Labor, Division of Local Area Unemployment Statistics, 2 Massachusetts Ave., NE., Room 4675, Washington, D.C. 20212. A copy is also available at SBA, Office of AA/HUB, 409 3rd Street, SW., Washington DC 20416.

Women-owned business (WOB) means a concern that is small pursuant to part 121 of this title, and is at least 51 percent owned and controlled by women.

Subpart B—Requirements to be a Qualified HUBZone SBC

§ 126.200 What requirements must a concern meet to receive SBA certification as a qualified HUBZone SBC?

- (a) The concern must be a HUBZone SBC as defined in § 126.103; and
- (b) At least 35 percent of the concern’s employees must reside in a HUBZone, and the HUBZone SBC must certify that it will attempt to maintain this percentage during the performance of any HUBZone contract it receives. When determining the percentage of employees that reside in a HUBZone, if the percentage results in a fraction round up to the nearest whole number,

Example 1: A concern has 25 employees, 35 percent or 8.75 employees must reside in a HUBZone. Thus, 9 employees must reside in a HUBZone.

Example 2: A concern has 95 employees, 35 percent or 33.25 employees must reside in a HUBZone. Thus, 34 employees must reside in a HUBZone.

and

(c) The HUBZone SBC must certify that it will ensure that it will comply with certain contract performance requirements in connection with contracts awarded to it as a qualified HUBZone SBC, as set forth in § 126.700.

§ 126.201 For this purpose, who does SBA consider to own a HUBZone SBC?

An owner of a HUBZone SBC is a person who owns any legal or equitable interest in such HUBZone SBC. More specifically:

(a) *Corporations.* SBA will consider any person who owns stock, whether voting or non-voting, to be an owner. SBA will consider options to purchase stock to have been exercised. SBA will consider the right to convert debentures into voting stock to have been exercised.

(b) *Partnerships.* SBA will consider a partner, whether general or limited, to be an owner if that partner owns an equitable interest in the partnership.

(c) *Sole proprietorships.* The proprietor is the owner.

(d) *Limited liability companies.* SBA will consider each member to be an owner of a limited liability company.

Example 1: All stock of a corporation is owned by U.S. citizens. The president of the corporation, a non-U.S. citizen, owns no stock in the corporation, but owns options to purchase stock in the corporation. SBA will consider the option exercised, and the corporation is not eligible to be a qualified HUBZone SBC.

Example 2: A partnership is owned 99.9 percent by persons who are U.S. citizens, and 0.1 percent by someone who is not. The partnership is not eligible because it is not 100 percent owned by U.S. citizens.

§ 126.202 Who does SBA consider to control a HUBZone SBC?

Control means both the day-to-day management and long-term decision-making authority for the HUBZone SBC. Many persons share control of a concern, including each of those occupying the following positions: officer, director, general partner, managing partner, and manager. In addition, key employees who possess critical licenses, expertise or responsibilities re-

lated to the concern's primary economic activity may share significant control of the concern. SBA will consider the control potential of such key employees on a case by case basis.

§ 126.203 What size standards apply to HUBZone SBCs?

(a) *At time of application for certification.* A HUBZone SBC must meet SBA's size standards for its primary industry classification as defined in § 121.201 of this title. If SBA is unable to verify that a concern is small, SBA may deny the concern status as a qualified HUBZone SBC, or SBA may request a formal size determination from the responsible Government Contracting Area Director or designee.

(b) *At time of contract offer.* A HUBZone SBC must be small within the size standard corresponding to the SIC code assigned to the contract.

§ 126.204 May a qualified HUBZone SBC have affiliates?

Yes. A qualified HUBZone SBC may have affiliates so long as the affiliates are also qualified HUBZone SBCs, 8(a) participants, or WOBs.

§ 126.205 May WOBs, 8(a) participants or SDBs be qualified HUBZone SBCs?

Yes. WOBs, 8(a) participants, and SDBs can qualify as HUBZone SBCs if they meet the additional requirements in this part.

§ 126.206 May non-manufacturers be qualified HUBZone SBCs?

Yes. Non-manufacturers (referred to in the HUBZone Act of 1997 as "regular dealers") may be certified as qualified HUBZone SBCs if they meet all the requirements set forth in § 126.200 and they can demonstrate that they can provide the product or products manufactured by qualified HUBZone SBCs. "Non-manufacturer" is defined in § 121.406(b)(1) of this title.

§ 126.207 May a qualified HUBZone SBC have offices or facilities in another HUBZone or outside a HUBZone?

Yes. A qualified HUBZone SBC may have offices or facilities in another HUBZone or even outside a HUBZone and still be a qualified HUBZone SBC.

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However, in order to qualify, the concern's principal office must be located in a HUBZone.

Subpart C—Certification

§ 126.300 How may a concern be certified as a qualified HUBZone SBC?

A concern must apply to SBA for certification. The application must include a representation that it meets the eligibility requirements described in § 126.200 and must submit relevant supporting information. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its sole discretion, may rely solely upon the information submitted to establish eligibility, or may request additional information, or may verify the information before making a determination. If SBA determines that the concern is a qualified HUBZone SBC, it will issue a certification to that effect and add the concern to the List.

§ 126.301 Is there any other way for a concern to obtain certification?

No. SBA certification is the only way to qualify for HUBZone program status.

§ 126.302 When may a concern apply for certification?

A concern may apply to SBA and submit the required information whenever it can represent that it meets the eligibility requirements, subject to § 126.309. All representations and supporting information contained in the application must be complete and accurate as of the date of submission. The application must be signed by an officer of the concern who is authorized to represent the concern.

§ 126.303 Where must a concern file its certification?

The concern must file its certification with the AA/HUB, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

§ 126.304 What must a concern submit to SBA?

(a) To be certified by SBA as a qualified HUBZone SBC, a concern must

represent to SBA that under the definitions set forth in § 126.103:

(1) It is a small business concern that is both owned only by United States citizens and controlled only by United States citizens;

(2) Its principal office is located in a HUBZone;

(3) Not less than 35 percent of its employees reside in a HUBZone;

(4) It will use good faith efforts to ensure that a minimum percentage of 35 percent of its employees continue to reside in a HUBZone so long as SBA certifies it as qualified and during the performance of any contract awarded to it on the basis of its status as a qualified HUBZone SBC; and

(5) It will ensure that, where it enters into subcontracts to aid in performance of any prime contracts awarded to it because of its status as a qualified HUBZone SBC, it will incur not less than a certain minimum percentage of certain contract costs as set forth in § 126.700.

(b) If the concern is applying for HUBZone status based on a location within the external boundaries of an Indian reservation, the concern must submit with its application for certification official documentation from the appropriate Bureau of Indian Affairs (BIA) Land Titles and Records Office with jurisdiction over the concern's area, confirming that it is located within the external boundaries of an Indian reservation. BIA lists the Land Titles and Records Offices and their jurisdiction in 25 CFR 150.4 and 150.5. In cases where BIA is unable to verify whether the business is located within the external boundaries of an Indian reservation, applicants should contact the AA/HUB and SBA will assist them.

(c) In addition to these representations, the concern must submit the forms, attachments, and any additional information required by SBA.

§ 126.305 What format must the certification to SBA take?

A concern must submit the required information in either a written or electronic application form provided by SBA. An electronic application must be sufficiently authenticated for enforcement purposes.

§ 126.306 How will SBA process the certification?

(a) The AA/HUB is authorized to approve or decline certifications. SBA will receive and review all certifications, but SBA will not process incomplete packages. SBA will make its determination within 30 calendar days after receipt of a complete package whenever practicable. The decision of the AA/HUB is the final agency decision.

(b) SBA will base its certification on facts existing on the date of submission. SBA, in its sole discretion, may request additional information or clarification of information contained in the submission at any time.

(c) If SBA approves the application, SBA will send a written notice to the concern and automatically enter it on the List described in § 126.307.

(d) A decision to deny eligibility must be in writing and state the specific reasons for denial.

§ 126.307 Where will SBA maintain the List of qualified HUBZone SBCs?

SBA maintains the List at its Internet website at <http://www.sba.gov/HUB>. Requesters also may obtain a copy of the List by writing to the AA/HUB at U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416 or via e-mail at aahub@sba.gov.

§ 126.308 What happens if SBA inadvertently omits a qualified HUBZone SBC from the List?

A HUBZone SBC that has received SBA's notice of certification, but is not on the List within 10 business days thereafter should immediately notify the AA/HUB in writing at U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416 or via e-mail at aahub@sba.gov. The concern must appear on the List to be eligible for HUBZone contracts.

§ 126.309 How may a declined or de-certified concern seek certification at a later date?

A concern that SBA has declined or de-certified may seek certification no sooner than one year from the date of decline or de-certification if it believes that it has overcome all reasons for de-

cline through changed circumstances, and is currently eligible.

Subpart D—Program Examinations**§ 126.400 Who will conduct program examinations?**

SBA field staff or others designated by the AA/HUB will conduct program examinations.

§ 126.401 What will SBA examine?

(a) *Eligibility.* Examiners will verify that the qualified HUBZone SBC met the requirements set forth in § 126.200 at the time of its application for certification and at the time of examination.

(b) *Scope of review.* Examiners may review any information related to the HUBZone SBC qualifying requirements, including documentation related to the location and ownership of the concern, the employee percentage requirements, and the concern's attempt to maintain this percentage. The qualified HUBZone SBC must document each employee's residence address through employment records. The examiner also may review property tax, public utility or postal records, and other relevant documents. The concern must retain documentation demonstrating satisfaction of the employee residence and other qualifying requirements for 6 years from date of submission to SBA.

§ 126.402 When may SBA conduct program examinations?

SBA may conduct a program examination at the time the concern certifies to SBA that it meets the requirements of the program or at any other time while the concern is on the List or subsequent to receipt of HUBZone contract benefits. For example, SBA may conduct a program examination to verify eligibility upon notification of a material change under § 126.501. Additionally, SBA, in its sole discretion, may perform random program examinations to determine continuing compliance with program requirements, or it may conduct a program examination in response to credible information calling into question the HUBZone status of a small business concern. For protests to the HUBZone status of a

small business concern in regard to a particular procurement, see § 126.800.

§ 126.403 May SBA require additional information from a HUBZone SBC?

Yes. At the discretion of the AA/HUB, SBA has the right to require that a HUBZone SBC submit additional information as part of the certification process, or at any time thereafter. If SBA finds a HUBZone SBC is not qualified, SBA will de-certify the concern and delete its name from the List. SBA may choose to pursue penalties against any concern that has made material misrepresentations in its submissions to SBA in accordance with § 126.900.

§ 126.404 What happens if SBA is unable to verify a qualified HUBZone SBC's eligibility?

(a) Authorized SBA headquarters personnel will first notify the concern in writing of the reasons why it is no longer eligible.

(b) The concern will have 10 business days from the date that it receives notification to respond.

(c) The AA/HUB will consider the reasons for proposed de-certification and the concern's response before making a decision whether to de-certify. The AA/HUB's decision is the final agency decision.

§ 126.405 What happens if SBA verifies eligibility?

If SBA verifies that the concern is eligible, it will amend the date of certification on the List to reflect the date of verification.

Subpart E—Maintaining HUBZone Status

§ 126.500 How does a qualified HUBZone SBC maintain HUBZone status?

(a) Any qualified HUBZone SBC wishing to remain on the List must self-certify annually to SBA that it remains a qualified HUBZone SBC.

(b) Concerns wishing to remain in the program without any interruption must self-certify their continued eligibility to SBA within 30 calendar days after each annual anniversary of their date of certification. Failure to do so will result in SBA de-certifying the

concern. The concern then would have to submit a new application for certification under §§ 126.300 through 126.306.

(c) The self-certification to SBA must be in writing and must represent that the circumstances relative to eligibility which existed on the date of certification showing on the List have not materially changed.

§ 126.501 What are a qualified HUBZone SBC's ongoing obligations to SBA?

The concern must immediately notify SBA of any material change which could affect its eligibility. The notification must be in writing, and must be sent or delivered to the AA/HUB to comply with this requirement. Failure of a qualified HUBZone SBC to notify SBA of such a material change will result in immediate de-certification and removal from the List, and SBA may seek the imposition of penalties under § 126.900. If the concern later becomes eligible for the program, the concern must apply for certification pursuant to §§ 126.300 through 126.309 and must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA may decline to certify the concern pursuant to § 126.306.

§ 126.502 Is there a limit to the length of time a qualified HUBZone SBC may be on the List?

There is no limit to the length of time a qualified HUBZone SBC may remain on the List so long as it continues to follow the provisions of §§ 126.200, 126.500, and 126.501.

§ 126.503 When is a concern removed from the List?

If SBA determines at any time that a HUBZone SBC is not qualified, SBA may de-certify the HUBZone SBC, remove the concern from the List, and seek imposition of penalties pursuant to § 126.900. An adverse finding in the resolution of a protest also may result in de-certification and removal from the List, and the imposition of penalties pursuant to § 126.900. Failure to notify SBA of a material change which could affect a concern's eligibility will

result in immediate de-certification, removal from the List, and SBA may seek the imposition of penalties under § 126.900.

Subpart F—Contractual Assistance

§ 126.600 What are HUBZone contracts?

HUBZone contracts are contracts awarded to a qualified HUBZone SBC through any of the following procurement methods:

- (a) Sole source awards to qualified HUBZone SBCs;
- (b) Set-aside awards based on competition restricted to qualified HUBZone SBCs; or
- (c) Awards to qualified HUBZone SBCs through full and open competition after a price evaluation preference in favor of qualified HUBZone SBCs.

§ 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?

(a) In order to submit an offer on a specific HUBZone contract, a concern must be small under the size standard corresponding to the SIC code assigned to the contract.

(b) At the time a qualified HUBZone SBC submits its offer on a specific contract, it must certify to the contracting officer that

(1) It is a qualified HUBZone SBC which appears on SBA's List;

(2) There has been no material change in its circumstances since the date of certification shown on the List which could affect its HUBZone eligibility; and

(3) It is small under the SIC code assigned to the procurement.

(c) If bidding as a joint venture, each qualified HUBZone SBC must make the certifications in paragraphs (b)(1), (2), and (3) of this section separately under its own name.

(d) A qualified HUBZone SBC which is a non-manufacturer may submit an offer on a contract for supplies if it meets the requirements under the non-manufacturer rule as defined in § 121.406(b) of this title and if the small manufacturer is also a qualified HUBZone SBC.

§ 126.602 Must a qualified HUBZone SBC maintain the employee residency percentage during contract performance?

The qualified HUBZone SBC must attempt to maintain the required percentage of employees who reside in a HUBZone during the performance of any contract awarded to the concern on the basis of HUBZone status. "Attempt to maintain" means making substantive and documented efforts to maintain that percentage such as written offers of employment, published advertisements seeking employees, and attendance at job fairs. HUBZone contracts are described more fully in § 126.600. Enforcement of this paragraph will be the responsibility of SBA, which will monitor the requirement in accordance with §§ 126.400 through 126.405.

§ 126.603 Does HUBZone certification guarantee receipt of HUBZone contracts?

No. Qualified HUBZone SBCs should market their capabilities to appropriate procuring agencies in order to increase their prospects of having a requirement set aside for HUBZone contract award.

§ 126.604 Who decides if a contract opportunity for HUBZone set-aside competition exists?

The contracting officer for the contracting activity makes this decision.

§ 126.605 What requirements are not available for HUBZone contracts?

A contracting activity may not make a requirement available for a HUBZone contract if:

(a) The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 46 *et seq.*, as amended; or

(b) An 8(a) participant currently is performing that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a) program, unless SBA has consented to release of the requirement from the section 8(a) program; or

(c) The requirement is at or below the micropurchase threshold.

§ 126.606 May a contracting officer request that SBA release an 8(a) requirement for award as a HUBZone contract?

Yes. However, SBA will grant its consent only where neither the incumbent nor any other 8(a) participant(s) can perform the requirement, and where the section 8(a) program will not be adversely affected. The SBA official authorized to grant such consent is the AA/8(a)BD.

§ 126.607 When must a contracting officer set aside a requirement for qualified HUBZone SBCs?

(a) The contracting officer first must review a requirement to determine whether it is excluded from HUBZone contracting pursuant to § 126.605.

(b) The contracting officer must identify qualified HUBZone 8(a) concerns and other 8(a) concerns. The contracting officer must give first priority to qualified HUBZone 8(a) concerns.

(c) After determining that neither paragraph (a) or (b) of this section apply, the contracting officer must set aside the requirement for competition restricted to qualified HUBZone SBCs if the contracting officer:

(1) Has a reasonable expectation, after reviewing SBA's list of qualified HUBZone SBCs that at least two responsible qualified HUBZone SBCs will submit offers; and

(2) Determines that award can be made at fair market price.

§ 126.608 Are there HUBZone contracting opportunities below the simplified acquisition threshold?

Yes. If the requirement is below the simplified acquisition threshold, the contracting officer should set-aside the requirement for consideration among qualified HUBZone SBCs using simplified acquisition procedures.

§ 126.609 What must the contracting officer do if a contracting opportunity does not exist for competition among qualified HUBZone SBCs?

If a contract opportunity for competition among qualified SBCs does not exist under the provisions of § 126.607,

the contracting officer must first consider the possibility of making an award to a qualified HUBZone SBC on a sole source basis, and then to a small business under small business set-aside procedures, in that order of precedence. If the criteria are not met for any of these special contracting authorities, then the contracting officer may solicit the procurement through another appropriate contracting method.

§ 126.610 May SBA appeal a contracting officer's decision not to reserve a procurement for award as a HUBZone contract?

The Administrator may appeal a contracting officer's decision not to make a particular requirement available for award as a HUBZone sole source or a HUBZone set-aside contract.

§ 126.611 What is the process for such an appeal?

(a) *Notice of appeal.* When the contracting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for award as a HUBZone contract, he or she must notify the Procurement Center Representative as soon as practicable. If the Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the head of the contracting activity issues a written decision on the appeal, unless the head of the contracting activity makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within 15 business days of SBA's notification to the contracting officer, SBA must file its formal appeal with the head of the contracting activity or that agency may consider the appeal withdrawn.

(d) *Decision.* The contracting activity must specify in writing the reasons for a denial of an appeal brought under this section.

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§ 126.612 When may a contracting officer award sole source contracts to a qualified HUBZone SBC?

A contracting officer may award a sole source contract to a qualified HUBZone SBC only when the contracting officer determines that:

(a) None of the provisions of §§ 126.605 or 126.607 apply;

(b) The anticipated award price of the contract, including options, will not exceed:

(1) \$5,000,000 for a requirement within the SIC codes for manufacturing; or

(2) \$3,000,000 for a requirement within all other SIC codes;

(c) Two or more qualified HUBZone SBCs are not likely to submit offers;

(d) A qualified HUBZone SBC is a responsible contractor able to perform the contract; and

(e) Contract award can be made at a fair and reasonable price.

§ 126.613 How does a price evaluation preference affect the bid of a qualified HUBZone SBC in full and open competition?

Where a contracting officer will award a contract on the basis of full and open competition, the contracting officer must deem the price offered by a qualified HUBZone SBC to be lower than the price offered by another offeror (other than another small business concern) if the price offered by the qualified HUBZone SBC is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror.

Example: In a full and open competition, a qualified HUBZone SBC submits an offer of \$98; another small business concern submits an offer of \$100; and a large business submits an offer of \$93. The lowest, responsive, responsible offeror would be the large business. However, the contracting officer must apply the HUBZone price evaluation preference. If the qualified HUBZone SBC's offer is not more than 10 percent higher than the large business's offer, the contracting officer must deem the qualified HUBZone SBC's price as lower than the price of the large business. In this example, the qualified HUBZone SBC's price is not more than 10 percent higher than the large business's price and, consequently, the qualified HUBZone SBC displaces the large business as the lowest, responsive, and responsible offeror. If the HUBZone SBC offer were \$101, the award would go to the large business at \$93. If the HUBZone SBC

will not benefit from the preference, the preference is not applied to change an offer.

§ 126.614 How does a contracting officer treat a concern that is both a qualified HUBZone SBC and an SDB in a full and open competition?

A concern that is both a qualified HUBZone SBC and an SDB must receive the benefit of both the HUBZone price evaluation preference described in § 126.614 and the SDB price evaluation preference described in 10 U.S.C. 2323 and the Federal Acquisition Streamlining Act, section 7102(a)(1)(B), Public Law 103-355, in a full and open competition.

§ 126.615 May a large business participate on a HUBZone contract?

A large business may not participate as a prime contractor on a HUBZone award but may participate as a subcontractor to an otherwise qualified HUBZone SBC, subject to the contract performance requirements set forth in § 126.700.

§ 126.616 What requirements must a joint venture satisfy to bid on a HUBZone contract?

A joint venture may bid on a HUBZone contract if the joint venture meets all of the following requirements:

(a) *HUBZone joint venture.* A qualified HUBZone SBC may enter into a joint venture with one or more other qualified HUBZone SBCs, 8(a) participants, or WOBs for the purpose of performing a specific HUBZone contract.

(b) *Size of concerns.* A joint venture of at least one qualified HUBZone SBC and an 8(a) participant or a woman-owned small business concern may submit an offer for a HUBZone contract so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:

(1) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract; and

(2) For a procurement having an employee-based size standard, the procurement exceeds \$10 million.

(c) *Performance of work.* The aggregate of the qualified HUBZone SBCs to

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the joint venture, not each concern separately, must perform the applicable percentage of work required by § 126.700.

Subpart G—Contract Performance Requirements

§ 126.700 What are the subcontracting percentage requirements under this program?

(a) *Subcontracting percentage requirements.* A qualified HUBZone SBC prime contractor can subcontract part of a HUBZone contract provided:

(1) In the case of a contract for services (except construction), the qualified HUBZone SBC spends at least 50 percent of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone SBCs;

(2) In the case of a contract for general construction, the qualified HUBZone SBC spends at least 15 percent of the cost of contract performance incurred for personnel on the concern's employees or the employees of other qualified HUBZone SBCs;

(3) In the case of a contract for construction by special trade contractors, the qualified HUBZone SBC spends at least 25 percent of the cost of contract performance incurred for personnel on the concerns' employees or the employees of other qualified HUBZone SBCs; and

(4) In the case of a contract for procurement of supplies (other than a procurement from a regular dealer in such supplies) the qualified HUBZone SBC spends at least 50 percent of the manufacturing cost (excluding the cost of materials) on performing the contract in a HUBZone. One or more qualified HUBZone SBCs may combine to meet this subcontracting percentage requirement.

(b) *Definitions.* Many definitions applicable to this section can be found in § 125.6 of this title.

§ 126.701 Can these subcontracting percentage requirements change?

Yes. The Administrator may change the subcontracting percentage requirements if the Administrator determines that such action is necessary to reflect conventional industry practices.

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§ 126.702 How can the subcontracting percentage requirements be changed?

Representatives of a national trade or industry group (as defined by two-digit Major Group industry codes) may request a change in subcontracting percentage requirements for that industry. Changes in subcontracting percentage requirements may be requested only for categories defined by two-digit Major Group industry codes in the Standard Industry Classification (SIC) Code system. SBA will not consider requests from anyone other than a representative of a national trade or industry group or requests for changes for four-digit SIC Code categories.

§ 126.703 What are the procedures for requesting changes in subcontracting percentages?

(a) *Format of request.* There is no prescribed format, but the requester should try to demonstrate to the Administrator that a change in percentage is necessary to reflect conventional industry practices, and should support its request with information including, but not limited to:

(1) Information relative to the economic conditions and structure of the entire national industry;

(2) Market data, technical changes in the industry and industry trends;

(3) Specific reasons and justifications for the change in the subcontracting percentage;

(4) The effect such a change would have on the federal procurement process; and

(5) Information demonstrating how the proposed change would promote the purposes of the HUBZone Program.

(b) *Notice to public.* Upon an adequate preliminary showing to SBA, SBA will publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a change in the subcontracting percentage requirements for a particular industry for HUBZone contracts. The notice will identify the group making the request, and give the public an opportunity to submit to the Administrator information and arguments in both support and opposition.

(c) *Comments.* Once SBA has published a notice in the FEDERAL REGISTER, it will afford a period of not less than 60 days for public comment.

(d) *Decision.* SBA will render its decision after the close of the comment period. If it decides against a change, it will publish notice of its decision in the FEDERAL REGISTER. Concurrent with the notice, SBA will advise the requester of its decision in writing. If it decides in favor of a change, SBA will propose an appropriate change to this part in accordance with proper rule-making procedures.

Subpart H—Protests

§ 126.800 Who may protest the status of a qualified HUBZone SBC?

(a) *For sole source procurements.* SBA or the contracting officer may protest the proposed awardee's qualified HUBZone SBC status.

(b) *For all other procurements.* Any interested party may protest the apparent successful offeror's qualified HUBZone SBC status.

§ 126.801 How does one file a HUBZone status protest?

(a) *General.* The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether a qualified HUBZone SBC is a "small" business for purposes of any Federal program are subject to part 121 of this title and must be filed in accordance with that part. If a protester protests both the size of the HUBZone SBC and whether the concern meets the HUBZone qualifying requirements set forth in § 126.200, SBA will process each protest concurrently, under the procedures set forth in part 121 of this title and this part.

(b) *Format.* Protests must be in writing and state all specific grounds for the protest. A protest merely asserting that the protested concern is not a qualified HUBZone SBC, without setting forth specific facts or allegations, is insufficient.

(c) *Filing.* (1) An interested party other than a contracting officer or SBA must submit its written protest to the contracting officer.

(2) A contracting officer and SBA must submit their protest to the AA/HUB.

(3) Protestors may deliver their protests in person, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period).

(d) *Timeliness.* (1) An interested party must submit its protest by close of business on the fifth business day after bid opening (in sealed bid acquisitions) or by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror (in negotiated acquisitions).

(2) Any protest received after the time limits is untimely.

(3) Any protest received prior to bid opening or notification of intended award, whichever applies, is premature.

(e) *Referral to SBA.* The contracting officer must forward to SBA any non-premature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send protests to AA/HUB, U.S. Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

§ 126.802 Who decides a HUBZone status protest?

The AA/HUB or designee will determine whether the concern has qualified HUBZone status.

§ 126.803 How will SBA process a HUBZone status protest?

(a) *Notice of receipt of protest.* (1) SBA immediately will notify the contracting officer and the protestor of the date SBA receives a protest and whether SBA will process the protest or dismiss it in accordance with § 126.804.

(2) If SBA determines the protest is timely and sufficiently specific, SBA will notify the protested HUBZone SBC of the protest and the identity of the protestor. The protested HUBZone SBC may submit information responsive to the protest within 5 business days.

(b) *Time period for determination.* (1) SBA will determine the HUBZone status of the protested HUBZone SBC within 15 business days after receipt of a protest.

(2) If SBA does not contact the contracting officer within 15 business days, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension.

(3) The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest.

(c) *Notice of determination.* SBA will notify the contracting officer, the protestor, and the protested concern of its determination.

(d) *Effect of determination.* The determination is effective immediately and is final unless overturned on appeal by the ADA/GC&8(a)BD, pursuant to § 126.805. If SBA upholds the protest, SBA will de-certify the concern as a qualified HUBZone SBC. If SBA denies the protest, after considering the merits of the protest, SBA will amend the date of certification on the List to reflect the date of protest decision.

§ 126.804 Will SBA decide all HUBZone status protests?

SBA will decide all protests not dismissed as premature, untimely or non-specific.

§ 126.805 What are the procedures for appeals of HUBZone status determinations?

(a) *Who may appeal.* The protested HUBZone SBC, the protestor, or the contracting officer may file appeals of protest determinations with SBA's ADA/GC&8(a)BD.

(b) *Timeliness of appeal.* SBA's ADA/GC&8(a)BD must receive the appeal no later than 5 business days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the five-day period.

(c) *Method of Submission.* The party appealing the decision may deliver its appeal in person, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period).

(d) *Notice of appeal.* The party bringing an appeal must provide notice of the appeal to the contracting activity contracting officer and either the protested HUBZone SBC or original protestor, as appropriate.

(e) *Grounds for appeal.* (1) SBA will re-examine a protest determination only if there was a clear and significant error in the processing of the protest or if the AA/HUB failed completely to consider a significant fact contained within the information supplied by the protestor or the protested HUBZone SBC.

(2) SBA will not consider additional information or changed circumstances that were not disclosed at the time of the AA/HUB's decision or that are based on disagreement with the findings and conclusions contained in the determination.

(f) *Contents of appeal.* The appeal must be in writing. The appeal must identify the protest determination being appealed and set forth a full and specific statement as to why the decision is erroneous or what significant fact the AA/HUB failed to consider.

(g) *Completion of appeal after award.* An appeal may proceed to completion even after award of the contract that prompted the protest, if so desired by the protested HUBZone SBC, or where SBA determines that a decision on appeal is meaningful.

(h) *Decision.* The ADA/GC&8(a)BD will make its decision within 5 business days of its receipt, if practicable, and will base its decision only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protestor, and the protested HUBZone SBC, consistent with law. The ADA/GC&8(a)BD's decision is the final agency decision.

Subpart I—Penalties

§ 126.900 What penalties may be imposed under this part?

(a) *Suspension or debarment.* The Agency debarring official may suspend or debar a person or concern pursuant to the procedures set forth in part 145 of this title. The contracting agency debarring official may debar or suspend a person or concern under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4.

(b) *Civil penalties.* Persons or concerns are subject to civil remedies under the False Claims Act, 31 U.S.C. 3729–3733,

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and under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, and any other applicable laws.

(c) *Criminal penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the HUBZone status of a small business concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended; 18 U.S.C. 1001; and 31 U.S.C. 3729-3733. Persons or concerns also are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

PART 130—SMALL BUSINESS DEVELOPMENT CENTERS

Sec.

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- 130.820 Reports and recordkeeping.
- 130.830 Audits and investigations.

AUTHORITY: Sections 5(b)(6) and 21 of the Small Business Act, as amended, 15 U.S.C. 634(b)(6) and 648; Pub. L. 101-515, 101 Stat.

2101; Pub. L. 101-574, 104 Stat. 2814; Pub. L. 102-366, 106 Stat. 986; and Pub. L. 102-395, 106 Stat. 1828.

SOURCE: 60 FR 31056, June 13, 1995, unless otherwise noted.

§ 130.100 Introduction.

(a) *Objective.* The SBDC Program creates a broad-based system of assistance for the small business community by linking the resources of Federal, State and local governments with the resources of the educational community and the private sector. Although SBA is responsible for the general management and oversight of the SBDC Program, a partnership exists between SBA and the recipient organization for the delivery of assistance to the small business community.

(b) *Incorporation of amended references.* All references in these regulations to OMB Circulars, other SBA regulations, Standard Operating Procedures, and other sources of SBA policy guidance incorporate all ensuing changes or amendments to such sources.

§ 130.110 Definitions.

Applicant organization. An entity, described in §130.200(a), which applies to establish and operate an SBDC network.

Application. The written submission by a new applicant organization or an existing recipient organization explaining its projected SBDC activities for the upcoming budget period and requesting SBA funding for use in its operations.

Area of Service. The State or territory, or portion of a State or territory (when there is more than one SBDC in a State or territory), or the District of Columbia, in which an applicant organization proposes to provide services or in which a recipient organization provides services.

Budget period. The 12-month period in which expenditure obligations are incurred by an SBDC network, coinciding with either the calendar year or the Federal fiscal year.

Cash Match. Non-Federal funds allocated specifically to the operation of the SBDC network equalling no less than fifty percent of the Federal funds.

Cash Match includes direct costs committed by the applicant or recipient organization and sponsoring SBDC organizations, to the extent that such costs are committed as part of the verified, specific, line item direct costs prior to funding. Cash Match does not include indirect costs, overhead costs or in-kind contributions.

Cognizant Agency. The Federal agency, other than SBA, from which a recipient organization or sponsoring SBDC organization receives its largest grant or greatest amount of Federal funding, and from which it obtains an indirect cost rate for budgetary and funding purposes, applicable throughout the Federal government.

Cooperative Agreement. The written contract between SBA and a recipient organization, describing the conditions under which SBA awards Federal funds and recipient organizations provide services to the small business community.

Cosponsorship. A “Cosponsorship” as defined in and governed by §8(b)(1)(A) of the Act and SBA’s Standard Operating Procedures.

Counseling. Individual advice, guidance or instruction given to a small business person or entity.

Direct costs: “Direct costs” as defined in Office of Management and Budget (OMB) Circulars A-21, A-87 and A-122. Recipient organizations must allocate at least 80 percent of the Federal funds provided through the Cooperative Agreement to the direct costs of program delivery.

Dispute. Dispute means a program or financial disagreement which the recipient organization requests be handled with SBA in a formal manner.

Grants and Cooperative Agreement Appeals Committee. The SBA committee, appointed by the SBA Administrator, which resolves appeals arising from financial Disputes between a recipient organization and SBA.

Grants Management Specialist. An SBA employee designated by the AA/SBDCs who is responsible for the financial review, award, and administration of one or more SBDC Cooperative Agreements.

In-kind contributions. Property, facilities, services or other non-monetary contributions from non-federal sources.

See OMB Circular A-87, A-102, or A-110, as appropriate.

Indirect costs. “Indirect costs” as defined in Office of Management and Budget (OMB) Circular A-21, A-87 or A-122.

Lead Center. The entity which administers and operates the SBDC network.

Lobbying. Lobbying as described in OMB Circulars A-21, A-87 and A-122, and Pub. L. 101–121, section 319.

Overmatched Amount. Non-Federal Contributions to SBDC project costs, including cash, in-kind contributions and indirect costs, in excess of the statutorily required amount.

Program Announcement. SBA’s annual publication of requirements which an applicant or recipient organization must address in its initial or renewal application.

Program income. Income earned or received by the SBDC network from any SBDC supported activity as defined in Attachment D of OMB Circular A-110 and Attachment E of OMB Circular A-102.

Program manager. An SBA employee responsible for overseeing the operations of one or more SBDCs.

Project officer. An SBA employee who negotiates the annual Cooperative Agreement and monitors the ongoing operations of an SBDC.

Project period. The period of time, usually in twelve (12) month increments, during which the SBDC network operates, beginning on the day of award and continuing over a number of budget periods.

Recipient organization. The name given to an applicant organization after funding is approved and the applicant organization enters into a Cooperative Agreement. The recipient organization receives the Federal funds and is responsible for establishing the Lead Center.

Recognized Organization. The organization whose members include a majority of SBDCs and which is recognized as an SBDC representative by SBA in accordance with §21(a)(3)(A) of the Small Business Act, 15 U.S.C. 648(a)(3)(A).

SBDC Director. The full-time senior manager designated by each recipient organization and approved by SBA.

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SBDC network. The Lead Center and SBDC service providers.

SBDC service providers. SBDC network participants, including the Lead Center, subcenters (at times referred to as regional centers), satellite locations, and any other entity authorized by the recipient organization to perform SBDC services.

Specialized Services. SBDC services other than Counseling and Training.

Sponsoring SBDC organizations. Organizations or entities which establish one or more SBDC service providers as part of the SBDC network under a contract or agreement with the recipient organization.

Training. The provision of advice, guidance and instruction to groups of prospective and existing small business persons and entities, whether by in-person group sessions or by such communication modes as teleconferences, videos, publications and electronic media.

§ 130.200 Eligible entities.

(a) *Recipient Organization.* The following entities are eligible to operate an SBDC network:

- (1) A public or private institution of higher education;
- (2) A land-grant college or university;
- (3) A college or school of business, engineering, commerce or agriculture;
- (4) A community or junior college;
- (5) An entity formed by two or more of the above entities; or
- (6) Any entity which was operating as a recipient organization as of December 31, 1990.

(b) *SBDC Service Providers.* SBDC service providers are not required to meet the eligibility requirements of a recipient organization.

§ 130.300 Small Business Development Centers (SBDCs). [Reserved]

§ 130.310 Area of service.

The AA/SBDC shall designate in writing the Area of Service of each recipient organization, consistent with the State plan. More than one recipient organization may be located in a State or Territory if the AA/SBDC determines it is necessary or beneficial to implement the Program effectively and to provide

services to all interested small businesses.

§ 130.320 Location of lead centers and SBDC service providers.

(a) The recipient organization must locate its Lead Center and SBDC service providers so that services are readily accessible to small businesses in the Area of Service.

(b) The locations of the Lead Center and the SBDC service providers will be reviewed by SBA as part of the application review process for each budget period.

§ 130.330 Operating requirements.

(a) The Lead Center must be an independent entity within the recipient organization, having its own staff, including a full-time SBDC Director.

(b) A Lead Center must provide administrative services and coordination for the SBDC network, including program development, program management, financial management, reports management, promotion and public relations, program assessment and evaluation, and internal quality control.

(c) The Lead Center shall be open to the public throughout the year during the normal business hours of the recipient organization. Anticipated closures shall be included in the annual renewal application. Emergency closures shall be reported to the SBA Project Officer as soon as is feasible. Other SBDC service providers shall be open during the normal business hours of their sponsoring SBDC organizations.

(d) The Lead Center and other SBDC service providers must have a conflict of interest policy applicable to their SBDC consultants, employees, instructors and volunteers.

(e) The SBDC network shall comply with 13 CFR parts 112, 113 and 117, which require that no person shall be excluded on the grounds of age, color, handicap, marital status, national origin, race, religion or sex from participation in, be denied that benefits of, or otherwise be subjected to discrimination under, any program or activity for which the recipient organization received Federal financial assistance from SBA.

§ 130.340 SBDC services and restrictions on service.

(a) *Services.* The SBDC network must provide prospective and existing small business persons and entities with Counseling, Training and Specialized Services, concerning the formation, financing, management and operation of small business enterprises, reflecting local needs. The recipient organization shall primarily utilize institutions of higher education to provide services to the small business community. To the extent possible, SBDCs shall use other Federal, State, and local government programs that assist small business. Services periodically should be assessed and improved to keep pace with changing small business needs.

(b) *Access to Capital.* (1) SBDCs are encouraged to provide counseling services that increase a small business concern's access to capital, such as business plan development, financial statement preparation and analysis, and cash flow preparation and analysis.

(2) SBDCs should help prepare their clients to represent themselves to lending institutions. While SBDCs may attend meetings with lenders to assist clients in preparing financial packages, the SBDCs may not take a direct role in representing clients in loan negotiations.

(3) SBDCs should inform their clients that financial packaging assistance does not guarantee receipt of a loan.

(4) SBDCs may not make loans, service loans or make credit decisions regarding the award of loans.

(5) With respect to SBA guaranty programs, SBDCs may assist clients to formulate a business plan, prepare financial statements, complete forms which are part of a loan application, and accompany an applicant appearing before SBA. Unless authorized by the SBA Administrator with respect to a specific program, an SBDC may not advocate, recommend approval or otherwise attempt in any manner to influence SBA to provide financial assistance to any of its clients. An SBDC cannot collect fees for helping a client to prepare an application for SBA financial assistance.

(c) *Special emphasis initiatives.* From time to time, SBA may identify portions of the general population to be

targeted for assistance by SBDCs. Support of SBA special emphasis initiatives will be negotiated each year as part of the application process and included in the Cooperative Agreement when appropriate.

§ 130.350 Specific program responsibilities.

(a) *Policy development.* SBA will establish Program policies and procedures to improve the delivery of services by SBDCs to the small business community, and to enhance compliance with applicable laws, regulations, OMB Circulars and Executive Orders. In doing so, SBA should consult, to the extent practicable, with the Recognized Organization.

(b) *Responsibilities of SBDC Directors.* The SBDC Director shall direct and monitor program activities and financial affairs of the SBDC network to deliver effective services to the small business community, comply with applicable laws, regulations, OMB Circulars and Executive Orders, and implement the Cooperative Agreement. The SBDC Director has authority to control expenditures under the Lead Center's budget. SBDC Directors may manage other programs in addition to the SBDC Program if the programs serve small businesses and do not duplicate the services provided by the SBDC network. However, SBDC Directors may not receive additional compensation for managing these programs. The SBDC Director shall serve as the principal contact point for all matters involving the SBDC network.

§ 130.360 SBDC advisory boards.

(a) *State/Regional Advisory Boards.* (1) The Lead Center must establish an advisory board to advise, counsel, and confer with the SBDC Director on matters pertaining to the operation of the SBDC network.

(2) The advisory board shall be referred to as a State SBDC Advisory Board in an Area of Service having only one recipient organization, and a Regional SBDC Advisory Board in an Area of Service having more than one recipient organization.

(3) These advisory boards must include small business owners and other

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representatives from the entire Area of Service.

(4) New Lead Centers must establish a State or Regional SBDC Advisory Board no later than the second budget period.

(5) A State or Regional SBDC Advisory Board member may also be a member of the National SBDC Advisory Board.

(6) The reasonable cost of travel of any Board member for official Board activities may be paid out of the SBDC's budgeted funds.

(b) *National SBDC Advisory Board.* (1) SBA shall establish a National SBDC Advisory Board consisting of nine members who are not Federal employees, appointed by the SBA Administrator. The Board shall elect a Chair. Three members of the Board shall be from universities or their affiliates and six shall be from small businesses or associations representing small businesses. Board members shall serve staggered three year terms, with three Board members appointed each year. The SBA Administrator may appoint successors to fill unexpired terms.

(2) The National SBDC Advisory Board shall advise and confer with SBA's AA/SBDCs on policy matters pertaining to the operation of the SBDC program. The Board shall meet with the AA/SBDCs at least semiannually.

§ 130.400 Application procedure. [Reserved]

§ 130.410 New applications.

(a) If SBA declines to renew an existing recipient organization or the recipient organization declines to re-apply, SBA may accept applications from other organizations interested in becoming a recipient organization. An eligible entity may apply by submitting an application to the SBA District Office in the Area of Service in which the applicant proposes to provide services.

(b) An application for initial funding of a new SBDC network must include a letter by the Governor, or his or her designee, of the Area of Service in which the SBDC will operate, or other evidence, confirming that the applicant's designation as an SBDC would

be consistent with the plan adopted by the State government and approved by SBA. No such requirement is imposed on subsequent applications from existing recipient organizations.

(c) The application must set forth the eligible entity or entities proposing to operate the SBDC network; a list of the Lead Center and other SBDC service providers by name, address and telephone number; the geographic areas to be serviced; the resources to be used; the services that will be provided; the method for delivering the services, including a description of how and to what extent academic, private and public resources will be used; a budget; a listing of the proposed members of the State or Regional Advisory Board and other relevant information set forth in the Program Announcement.

(d) SBA officials may request supplemental information or documentation to revise or complete an application.

(e) Upon written recommendation for approval by the SBA District Director, the proposal shall be submitted to the AA/SBDCs for review.

§ 130.420 Renewal applications.

(a) SBDCs shall comply with the requirements in the annual Program Announcement, including format and due dates, to receive consideration of their renewal applications. The SBA Project Officer, with the concurrence of the Program Manager, may grant an extension. The recipient organization shall submit the renewal application to the SBA office in the District in which the recipient organization is located. The annual Program Announcement will include a timetable for SBA review.

(b) After review by the SBA Project Officer and written recommendation for approval by the District Director, the Program Manager and Grants Management Specialist shall review the renewal application for conformity with the Program Announcement, OMB Circulars and all other statutory, financial and regulatory requirements. SBA officials may request supplemental information and documentation prior to issuing the Cooperative Agreement.

§ 130.430 Application decisions.

(a) The AA/SBDCs may approve, conditionally approve, or reject any application. In the event of a rejection, the AA/SBDCs shall communicate the reasons for rejection to the applicant and the appropriate SBA field office. If the approval is conditional, the conditions and applicable remedies shall be specified as special terms and conditions in the Cooperative Agreement. Upon approval or conditional approval, the Grants Management specialist may issue a Cooperative Agreement.

(b) In considering the application, significant factors shall include:

(1) The applicant's ability to contribute Matching Funds;

(2) For renewal Proposals, the quality of prior performance;

(3) The results of any examination conducted pursuant to § 130.810(b) of these regulations; and

(4) Any certification resulting from any certification program developed by the Recognized Organization.

(c) In the event of a conditional approval, SBA may conditionally fund a recipient organization for one or more specified periods of time up to a maximum of one budget period. If the recipient organization fails to resolve the specified matters to the AA/SBDCs' satisfaction within the allotted time period, SBA has the right to discontinue funding the SBDC, subject to the provisions of § 130.700.

§ 130.440 Maximum grant.

No recipient shall receive an SBDC grant exceeding the greater of the minimum statutory amount, or its pro rata share of all SBDC grants as determined by the statutory formula set forth in section 21(a)(4) of the Act.

§ 130.450 Matching funds.

(a) The recipient organization must provide total Matching Funds equal to the total amount of SBA funding. At least 50% of the Matching Funds must be Cash Match. The remaining 50% may be provided through any allowable combination of additional cash, in-kind contributions, or indirect costs.

(b) All sources of Matching Funds must be identified as specifically as possible in the budget proposal. Cash sources shall be identified by name and

account. All applicants must submit a Certification of Cash Match and Program Income executed by an authorized official of the recipient organization or any sponsoring SBDC organization providing Cash Match through a subcontract agreement. The account containing such cash must be under the direct management of the SBDC Director, or, if provided by a sponsoring SBDC organization, its subcenter Director. If a political entity is providing such cash and the funds have not been appropriated prior to issuance of the Cooperative Agreement, the recipient organization must certify that sufficient funds will be available from the political entity prior to the use of Federal dollars.

(c) The Grants Management Specialist is responsible for determining whether Matching Funds or Cash Match meet the requirements of the Act and appropriate OMB circulars.

(d) *Overmatched Amounts.* (1) SBDC are encouraged to furnish Overmatched Amounts.

(2) An Overmatched Amount can be applied to additional Matching Funds requirements necessitated by any supplemental funding increase received by the SBDC during the budget period, as long as the total Cash Match provided by the SBDC is 50% or more of the total SBA funds provided during the budget period.

(3) If used in the manner described in paragraph (d)(2) of this section, such Overmatched Amount is reclassified as committed Matching Funds.

(4) Allowable Overmatched Amounts which have not been used in the manner described in paragraph (d)(2) of this section may, with the approval of the AA/SBDCs, be used as a credit to offset any confirmed audit disallowances applicable only to the budget period in which the Overmatched Amount exists and the two previous budget periods. Such offsetting funds shall be considered Matching Funds.

(e) *Impermissible sources of Matching Funds.* Under no circumstances may the following be used as sources of the Matching Funds of the recipient organization:

(1) Uncompensated student labor;

(2) SCORE, ACE, or SBI volunteers;

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(3) Program income or fees collected from small businesses receiving assistance;

(4) Funds or indirect or in-kind contributions from any other Federal source.

§ 130.460 Budget justification.

The SBDC Director, as a part of the renewal application, or the applicant organization's authorized representative in the case of a new SBDC application, shall prepare and submit to the SBA Project Officer the budget justification for the upcoming budget period. The budget shall be reviewed annually upon submission of a renewal application.

(a) *Direct costs.* Unless otherwise provided in applicable OMB circulars, at least eighty percent (80%) of SBA funding must be allocated to direct costs of Program delivery.

(b) *Indirect costs.* If the applicant organization waives all indirect costs to meet the Matching Funds requirement, one hundred percent (100%) of SBA funding must be allocated to program delivery. If some, but not all, indirect costs are waived to meet the Matching Funds requirement, the lesser of the following may be allocated as indirect costs of the Program and charged against the Federal contribution:

(1) Twenty percent (20%) of Federal contribution, or

(2) The amount remaining after the waived portion of indirect costs is subtracted from the total indirect costs.

(c) *Separate SBDC service provider budgets.*

(1) The applicant organization shall include separate budgets for all subcontracted SBDC service providers in conformity with OMB requirements. Applicable direct cost categories and indirect cost base/rate agreements shall be included for the Lead Center and all SBDC service providers, using a rate equal to or less than the negotiated predetermined rate. If no such rate exists, the sponsoring SBDC organization or SBDC service provider shall negotiate a rate with its Cognizant Agency. In the event the sponsoring SBDC organization or SBDC service provider does not have a Cognizant Agency, the rate shall be negotiated with the SBA Project Officer in accordance with

OMB guidelines (see OMB Circular A-21).

(2) The amount of cash, in-kind contributions and indirect costs for the Lead Center and all sub-contracted SBDC service providers shall be indicated in accordance with OMB requirements.

(d) *Cost principles.* Principles for determining allowable costs are contained in OMB Circulars A-21 (cost principles for grants, contracts, and other agreements with educational institutions), A-87 (cost principles for programs administered by State and local governments), and A-122 (cost principles for nonprofit organizations).

(e) *Costs associated with lobbying.* No portion of the Federal contribution received by an SBDC may be used for lobbying activities, either directly by the SBDC or indirectly through outside organizations, except those activities permitted by OMB. Restrictions on and reports of lobbying activities by the SBDC shall be in accordance with OMB requirements, Section 319 of Public Law No. 101-121, and the annual Program Announcement.

(f) *Salaries.* (1) If a recipient organization is an educational institution, the salaries of the SBDC Director and the subcenter Directors must approximate the average annualized salary of a full professor and an assistant professor, respectively, in the school or department in which the SBDC is located. If a recipient organization is not an educational institution, the salaries of the SBDC Director and the subcenter Directors must approximate the average salaries of parallel positions within the recipient organization. In both cases, the recipient organization should consider the Director's longevity in the Program, the number of subcenters and the individual's experience and background.

(2) Salaries for all other positions within the SBDC should be based upon level of responsibility, and be comparable to salaries for similar positions in the area served by the SBDC.

(3) Recruitment and salary increases for SBDC Directors, subcenter Directors and staff members should conform to the administrative policy of the recipient organization.

(g) *Travel.* All travel must be separately identified in the proposed budget as planned in-State, planned out-of-State, unplanned in-State or unplanned out-of-State. All proposed travel must use coach class, apply directly to specific work of the SBDC or be incurred in the normal course of Program administration, and conform to the written travel policies of the recipient organization or the sponsoring SBDC organization. (Per diem rates, including lodging, shall not exceed those authorized by the recipient organization.) Transportation costs must be justified in writing, including the estimated cost, number of persons traveling, and the benefit to be derived by the small business community from the proposed travel. A specific projected amount, based on the SBDC's past experience, where appropriate, must also be included in the budget for unplanned travel. A more detailed justification must be given for unplanned out-of-State travel. Any proposed unplanned out-of-State travel exceeding the approved budgeted amount for travel must be submitted to the Project Officer for approval on a case-by-case basis. Travel outside the United States must have prior approval by the AA/SBDCs on a case-by-case basis.

(h) *Dues.* Costs of memberships in business, technical, and professional organizations shall be allowable expenses. The use of Federal funds to pay dues for business, technical and professional organizations shall be permitted, provided that the payments are included in the budget proposal, are approved by the SBA and comply with § 130.460(e).

§ 130.470 Fees.

An SBDC may charge clients a reasonable fee to cover the costs of Training sponsored or cosponsored by the SBDC, costs of services provided by or obtained from third parties, or the costs of providing Specialized Services. Fees may not be imposed for Counseling.

§ 130.480 Program income.

(a) Program income for recipient organizations or SBDC service providers based in universities or nonprofit organizations shall be subject to OMB re-

quirements (see OMB Circular A-110). Program income for recipient organizations or SBDC service providers based in State or local governments shall be subject to OMB requirements (see the provisions of § 7.e and Attachment E of OMB Circular A-102) and 13 CFR 143.25.

(b) Program income, including any interest earned on Program income, must be used to expand the quantity or quality of services, resources or outreach provided by the SBDC network. It cannot be used to satisfy the requirements for Matching Funds. The Project Officer shall monitor the use of Program income. Any unused Program income will be carried over to a subsequent budget period.

(c) SBDCs must report in detail on standard SBA forms receipts and expenditures of program income, including any income received through co-sponsored activities. A narrative description of how Program income was used to accomplish Program objectives shall be included.

§ 130.500 Funding.

The SBA funds Cooperative Agreements through its internal Letter of Credit Replacement System (LORS), using SBA standard forms to establish and modify letters of credit. SBDCs must use SBA standard forms to draw down funds required to meet their estimated or actual expenses and to submit quarterly cash transactions reports used by SBA to monitor the frequency of drawdowns and the cash-on-hand balance. Repeated drawdowns in excess of immediate cash needs may result in the cancellation of the letter of credit. If interest results from the deposit of any drawdowns in an interest-bearing account, SBDCs, other than State government sponsored SBDCs, must report and return such interest annually to SBA.

§ 130.600 Cooperative agreement. [Reserved]

§ 130.610 General terms.

Upon approval of the initial or renewal application, SBA will enter into a Cooperative Agreement with the recipient organization, setting forth the programmatic and fiscal responsibilities of the recipient organization and

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SBA, the scope of the project to be funded, and the budget of the program year covered by the Cooperative Agreement. Administrative requirements are contained in 13 CFR 143 and applicable OMB Circulars.

§ 130.620 Revisions and amendments to cooperative agreement.

(a) *Requests for revisions.* The recipient organization may request at any time one or more revisions to the Cooperative Agreement on an appropriate SBA form signed by the recipient organization's authorized representative (including a revised budget and budget narrative, if applicable). Revisions will normally relate to changes in scope, work or funding during the specified budget year.

(b) *Revisions which require amendment to Cooperative Agreement.* The Cooperative Agreement shall list the revisions which require Project Officer concurrence, review by the Program Manager and the Grants Management Specialist, approval of the AA/SBDCs and amendment of the Cooperative Agreement. No application for an amendment shall be effective until it is approved and incorporated into the Cooperative Agreement. Revisions which require amendments shall include:

(1) Any change in project scope or objectives;

(2) The addition or deletion of any subgrants or contracts;

(3) The addition of any new budget line items;

(4) Budget revisions and fund reallocations exceeding the limit established by applicable administrative regulations or OMB Circulars, either individually or in the aggregate (see paragraphs (c)(1) and (c)(2) of this section);

(5) Any proposed sole-source or one-bid contracts exceeding the limits established by applicable regulations or OMB Circulars; and

(6) The carryover from one budget period to the next budget period of unobligated, unexpended SBA funds allocable under the Cooperative Agreement to nonrecurring, nonseverable bona fide needs of the SBDC network as provided in applicable OMB Circulars and the annual Program Announcement.

(c) *Revisions which do not require amendments to the Cooperative Agreement.* (1) *Budget revisions.* Any budget revision, except those which are covered by paragraph (b)(4) of this section. Budget revisions require approval of the SBA Project Officer and the AA/SBDCs as prescribed by applicable OMB Circulars or 13 CFR 143.30.

(2) *Reallocation of funds.* Reallocation of funds must be conducted in accordance with applicable OMB Circulars or 13 CFR 143.30. Additional guidance on this matter may be included in the annual Program Announcement.

§ 130.630 Dispute resolution procedures.

(a) *Financial Disputes.* (1) A recipient organization wishing to resolve a financial Dispute formally must submit a written statement describing the subject of the Dispute, together with any relevant documents or other evidence bearing on the Dispute, to the Grants Management Specialist, with copies to the Project Officer. The Grants Management Specialist shall respond in writing to the recipient organization within 30 calendar days of receipt of the descriptive statement.

(2) If the recipient organization receives an unfavorable decision from the Grants Management Specialist, it may file an appeal with the AA/SBDCs within 30 calendar days of issuance of the unfavorable decision. The AA/SBDCs shall respond in writing to the recipient organization within 15 calendar days of receipt of the appeal.

(3) If the recipient organization receives an unfavorable decision from the AA/SBDCs, it may make a final appeal to the SBA Grants and Cooperative Agreements Appeals Committee (the "Committee") within 30 calendar days of the date of issuance of the AA/SBDCs' written decision. Copies of the appeal shall also be sent to the Grants Management Specialist and the Project Officer.

(4) Appeals must be in writing. Formal briefs and other technical forms of pleading are not required. Requests for a hearing will not be granted unless there are material facts substantially in dispute. Appeals must contain at least the following:

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(i) Name and address of the recipient organization;

(ii) The SBA field office;

(iii) The Cooperative Agreement;

(iv) A statement of the grounds for appeal, with reasons why the appeal should be sustained;

(v) The specific relief desired on appeal; and

(vi) If a hearing is requested, a statement of the material facts which are substantially in dispute.

(5) The AA/SBDCs or the Committee may request from the SBDC or the District Office additional information or documentation at any stage in the proceedings.

(6) If a request for a hearing is granted, the Committee will provide the recipient organization with written instructions, and will afford the parties an opportunity to present their positions to the Committee.

(7) The Committee will reach a decision on the merits of the appeal within 30 days of the hearing date.

(8) The Chairperson, with advice from the Office of General Counsel, shall prepare and transmit a written final decision to the recipient organization with copies to the Grants Management Specialist and the Project Officer.

(9) *Expedited Dispute appeal process.* By an affirmative vote constituting a majority of its total membership, the Committee may shorten response times to attain final resolution of a Dispute before the issuance date of a new Cooperative Agreement. At any time within 120 days of the end of the budget period, the recipient organization may submit a written request to use an expedited process. If a Dispute affects refunding, the Committee must meet to consider the matter prior to the end of the budget period, provided that the recipient organization has supplied the Committee with all requested documentation.

(b) *Programmatic (non-financial) Disputes.* (1) If a programmatic Dispute is not resolved at the SBA District Office level, the recipient organization may request its submission to the next SBA administrative level having authority to review such matter. The Project Officer shall refer the Dispute in writing, including comments of the SBDC Di-

rector, within 15 calendar days of receipt of the request.

(2) If the programmatic Dispute is not resolved at an intermediate SBA administrative level within 15 calendar days of receipt thereof, it shall be forwarded, in writing, to the AA/SBDCs for final resolution. All comments of the SBDC Director must be included in any package forwarded to the AA/SBDCs.

(3) The AA/SBDCs shall transmit a final, written decision to the recipient organization, the SBDC Director, the SBA Project Officer and other appropriate SBA field office personnel within 30 calendar days of receipt of such documentation, unless an extension of time is mutually agreed upon by the recipient organization and the AA/SBDCs.

§ 130.700 Suspension, termination and non-renewal.

(a) *General.* After SBA has entered into a Cooperative Agreement with a recipient organization, it shall not suspend, terminate or fail to renew the agreement unless SBA gives the recipient organization written notice setting forth the reasons and affording the recipient organization an opportunity for a hearing. Subject to this requirement and the provisions of § 130.700(c) regarding non-renewal procedures for non-performance, the applicable general procedures for suspension and termination are contained in 13 CFR 143.43 and 143.44, and in OMB Circular A-110, Attachment L.

(b) *Causes.* Causes which may lead to suspension, termination, or failure to renew include non-performance, poor performance, unwillingness to implement changes to improve performance, or any of the following reasons:

(1) Disregard or material violation of these regulations;

(2) A willful or material failure to perform under the Cooperative Agreement or under these regulations;

(3) Conduct reflecting a lack of business integrity or honesty;

(4) A conflict of interest causing real or perceived detriment to a small business concern, a contractor, the SBDC or SBA;

(5) Improper use of Federal funds;

(6) Failure of a Lead Center or its subcenters to consent to audits or examination or to maintain required documents or records;

(7) Failure of the SBDC Director to work at the SBDC Lead Center on a full-time basis;

(8) Failure promptly to suspend or terminate the employment of an SBDC Director, subcenter Director or other key employee upon receipt of knowledge by the recipient organization and/or SBA that such individual is engaging in or has engaged in conduct resulting in a criminal conviction or civil judgment which would cause the public to question the SBDC's business integrity, taking into consideration such factors as the magnitude, repetitiveness, harm caused and remoteness in time of the activity or activities underlying the conviction or judgment.

(9) Violation of the SBDC's standards of conduct as specified in these rules and as established by the SBDC pursuant to these rules; or

(10) Any other cause not otherwise specified which materially and adversely affects the operation or integrity of an SBDC or the SBDC program.

(c) *Non-Renewal Procedure.* (1) Subject to § 130.700(a), when an SBA District Director believes there is sufficient evidence of SBDC nonperformance, poor performance or unwillingness to implement changes to improve performance, under the terms of the Cooperative Agreement or these regulations, the District Director shall notify the SBDC Director and any other appropriate official of the recipient organization of an intention not to approve its renewal application.

(2) Notice can be submitted at any time during the budget period, but normally should be sent no later than 3 months prior to the due date for renewal applications at the District Office.

(3) The notice shall specifically cite the reasons for the intention not to renew. It must allow the recipient organization 60 days within which to change its operations to correct the problems cited in the notice, and to report to the Project Officer, in writing, regarding the results of such changes.

(4) If the recipient organization is unwilling or unable to address the spe-

cific problem areas to the satisfaction of the SBA District Office within the 60-day period, the SBA Project Officer shall have ten (10) calendar days after expiration of the 60 days to submit to the AA/SBDCs a written description of the unresolved issues, a summary of the positions of the District Office on the issues, and any supportive documentation.

(5) The AA/SBDCs shall transmit a written, final decision to the recipient organization, the SBDC Director, the SBA Project Officer and other appropriate SBA field office personnel within 30 calendar days of receipt of such documentation, unless an extension of time is mutually agreed upon by the recipient organization and the AA/SBDCs.

(6) The AA/SBDCs shall consider written documentation of the issues to be resolved, including all relevant correspondence between the Project Officer, District Director and any other SBA personnel and the affected recipient organization. At a minimum, such documentation shall commence with the first written notice of issues invoking the non-renewal procedure. In addition, the AA/SBDCs also may communicate with the recipient organization and appropriate SBA personnel.

(7) If the AA/SBDCs determines that the evidence submitted establishes nonperformance, ineffective performance or an unwillingness to implement suggested changes to improve performance, the AA/SBDCs shall have full discretion to order non-renewal of the SBDC. The SBA District Office shall then pursue proposals from other organizations interested in applying for SBDC designation. The incumbent SBDC shall have until the end of the budget period or 120 days, whichever is longer, to conclude operations and to submit close-out documents to the SBA District Office. Close-out procedures shall conform with applicable OMB Circulars.

(d) *Effect of action on subcenter.* If competing applications are being accepted, a subcenter of the previously funded recipient organization may apply for designation as the recipient organization, so long as the subcenter

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was not involved in the conduct leading to non-renewal or termination of the former recipient organization.

§ 130.800 Oversight of the SBDC program.

SBA shall monitor and oversee the Cooperative Agreement and ongoing operations of the SBDC network to ensure the effective and efficient use of Federal funds for the benefit of the small business community.

§ 130.810 SBA review authority.

(a) *Site visits.* The AA/SBDCs, or a representative, on notice to the SBDC Director, is authorized to make programmatic and financial review visits to SBDC service providers to inspect records and client files, and to analyze and assess SBDC activities.

(b) *SBA examinations.* SBA examiners shall perform a biannual programmatic and financial examination of each SBDC.

(c) *Certification program.* SBA may provide financial support to the Recognized Organization to develop and implement an SBDC certification program.

(d) *Audits.* The examinations by SBA examiners shall not substitute for audits required of Federal grantees under the Single Audit Act of 1984 or applicable OMB guidelines (see Circulars A-110, A-128 and A-133), nor shall such internal review substitute for audits to be conducted by the SBA Office of Inspector General under authority of the Inspector General Act of 1978, as amended (see § 130.830(b)).

§ 130.820 Reports and recordkeeping.

(a) *Records.* The recipient organization shall maintain the records required for a Lead Center audit and SBA reports. Lead Centers and other SBDC service providers shall maintain detailed, complete and accurate client activity files, specifying counseling, training and other assistance provided.

(b) *Reports.* The recipient organization shall submit client service evaluations and performance and financial reports for SBA review to determine the quality of services provided by the SBDC, the completeness and accuracy of SBDC records, and actual SBDC net-

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work accomplishments compared to performance objectives.

(c) *Performance reports.* For recipient organizations in the Program for more than three years, interim reports shall be due 30 days after completion of six months of operation each year; for those recipient organizations in the Program three years or less, reports shall be due 30 days after completion of each of the first three quarters. The annual report shall include the second semiannual or the fourth quarter report and shall be due December 30 for fiscal year and March 30 for calendar year SBDCs. These reports shall reflect accurately the activities, accomplishments and deficiencies of the SBDC network.

(d) *Financial reports.* The recipient organization shall provide three quarterly and one annual financial report to the SBA Project Officer as set forth in the Program Announcement and the Cooperative Agreement, in compliance with OMB Circulars.

(e) *Availability of records.* As required by OMB (see Circular A-133), all SBDC service provider records shall be made available to SBA for review upon request.

§ 130.830 Audits and investigations.

(a) *Access to records.* Applicable OMB Circulars set forth the requirements concerning record access and retention.

(b) *Audits.* (1) *Pre-award audit.* Applicant organizations that propose to enter the Program for the first time may be subject to a pre-award audit conducted by or coordinated with the SBA Office of Inspector General. The purpose of a pre-award audit is to verify the adequacy of the accounting system, the suitability of posed costs and the nature and source of proposed Matching Funds.

(2) *Interim or final audits.* The recipient organization or SBA may conduct SBDC network audits. All audits will be conducted according to *Government Auditing Standards*, promulgated by the Comptroller General of the United States.

(i) The recipient organization will conduct its audits as a single audit of a recipient organization pursuant to OMB Circulars A-102, A-110, A-128, and A-133, as applicable.

(ii) The SBA Office of Inspector General or its agents will conduct, supervise, or coordinate SBA's audits, which may, at SBA's discretion, be audits of the SBDC network, even though single audits may have been performed. In such instances, SBA will conduct such audits in compliance with *Government Auditing Standards* and all applicable OMB Circulars.

(c) *Investigations.* SBA may conduct investigations as it deems necessary to determine whether any person or entity has engaged in acts or practices constituting a violation of the Act, any rule, regulation or order issued under that Act, or any other applicable Federal law.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

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AUTHORITY: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), and 637(a).

SOURCE: 61 FR 2683, Jan. 29, 1996, unless otherwise noted.

Subpart A—General Rules

§ 134.101 Definitions.

As used in this part:

AA/OHA means the Assistant Administrator for OHA.

Act means the Small Business Act, 15 U.S.C. 631 *et seq.*

Address means the primary home or business address of a person or entity, including the street location or postal box number, city or town, state, and postal zip code.

Area Office means a Government Contracting Area Office or a Disaster Area Office of the Small Business Administration.

Day means a calendar day, unless a Judge specifies otherwise.

Hearing means the presentation and consideration of argument and evidence. A hearing need not include live testimony or argument.

Investment Act means the Small Business Investment Act of 1958, 15 U.S.C. 661 *et seq.*

Judge means an Administrative Law Judge or an Administrative Judge of OHA, or the AA/OHA when he or she acts as an Administrative Judge.

OHA means the Office of Hearings and Appeals.

Party means the petitioner, respondent, or intervenor.

Person means an individual or any form of business entity.

Petition means a written complaint, a written appeal from an SBA determination, or a written request for the initiation of proceedings before OHA.

Pleading means a petition, an order to show cause commencing a case, an appeal petition, an answer, or any amendment or supplement to those documents.

Respondent means any person or governmental agency against which a case has been brought before OHA.

SBA means the Small Business Administration.

SIC code means Standard Industrial Classification code.

Size determination means a formal size determination made by an Area Office.

§ 134.102 Jurisdiction of OHA.

OHA has authority to conduct proceedings in the following cases:

(a) The revocation or suspension of Small Business Investment Company licenses, cease and desist orders, and the removal or suspension of directors and officers of licensees, under the Investment Act and part 107 of this chapter;

(b) Alleged violations of those civil rights laws which are effectuated by parts 112, 113, 117, and 136 of this chapter;

(c) The revocation of the privilege of a person to conduct business with SBA under the Act and part 103 of this chapter;

(d) The eligibility of, or preferred or certified status of, any bank or non-bank lender to continue to participate in SBA loan programs under the Act and part 120 of this chapter;

(e) The suspension or termination of surety bond program participants under 15 U.S.C. 694a *et seq.* and part 115 of this chapter;

(f) The rights, privileges, or obligations of development companies under section 504 of the Investment Act and part 120, subpart H, of this chapter;

(g) Allowance of fees and expenses under the Equal Access to Justice Act, 5 U.S.C. 504;

(h) Debarment from appearance before the SBA because of post-employment restrictions under 18 U.S.C. 207 and part 105 of this chapter;

(i) Collection of debts owed to SBA and the United States under the Debt

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Collection Act of 1982 and part 140 of this chapter;

(j) Appeals from the following SBA 8(a) program determinations under the Act and part 124 of this chapter:

(1) Denial of program admission based solely on a negative finding as to social disadvantage, economic disadvantage, ownership or control; program termination; program graduation; or denial of a waiver of the requirement to perform to completion an 8(a) contract; and

(2) Program suspension;

(k) Appeals from size determinations and SIC code designations under part 121 of this chapter;

(l) The imposition of civil penalties and assessments against persons who make false claims or statements to SBA under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812 and part 142 of this chapter; and

(m) Any other hearing, determination, or appeal proceeding referred to OHA by the Administrator of SBA.

§ 134.103 Rules applicable to time periods provided in this part.

(a) The day from which the time period is computed is excluded, but the last business day is counted, excluding Saturday, Sunday, or Federal holiday.

(b) At the Judge's initiative, or upon the motion of a party showing good cause, the Judge may modify any of the applicable time limits, other than those established by statute and those governing when a case may be commenced. Any motion to extend a time limit must be filed and served before the expiration of that time limit.

Subpart B—Rules of Practice for Most Cases

§ 134.201 Scope of the rules in this subpart B.

The rules in this subpart generally apply to all proceedings over which OHA has jurisdiction, except for appeals from size determinations and SIC code designations. Specific procedural rules pertaining to 8(a) program appeals and to proceedings under the Program Fraud Civil Remedies Act are set forth, respectively in subpart D of this part and part 142 of this chapter. In the case of a conflict between a particular

rule in this subpart and a rule of procedure pertaining to OHA appearing in another subpart of this part or another part of this chapter, the latter rule shall govern.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998]

§ 134.202 Commencement of cases.

A case may be commenced by filing a written petition within the following time periods:

(a) Except as provided by paragraphs (b) through (d) of this section, no later than 45 days from the date of service of the SBA action or determination to which the petition relates;

(b) In debt collection proceedings under part 140 of this chapter, no later than 15 days after receipt of a notice of indebtedness and intention to collect such debt by salary or administrative offset;

(c) In applications for an award of fees pursuant to subpart E of this part, no later than 30 days after the decision to which it applies becomes final;

(d) For 8(a) program suspension proceedings, see § 134.305 of this chapter.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998]

§ 134.203 The petition.

(a) A petition must contain the following:

(1) The basis of OHA's jurisdiction;

(2) The SBA determination being appealed.

(3) A clear and concise statement of the factual basis of the case;

(4) The relief being sought; and

(5) The name, address, telephone number, and signature of the petitioner or its attorney.

(b) A petition which does not contain all of the information required by paragraph (a) of this section may be dismissed, with or without prejudice, at the Judge's own initiative, or upon motion of the respondent.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998]

§ 134.204 Service and filing requirements.

(a) *Service.* Each party is responsible for the service of its pleadings and

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other submissions upon all other parties or their attorneys. Unless otherwise ordered by the Judge, service is made by providing each party, or its attorney, with a copy of the pleading or other submission by personal delivery, first-class mail, express mail, facsimile transmission, or commercial delivery service. Service by mail must be directed as follows:

(1) To a party's last-known residence or business address if it has not yet appeared in the case, or to the address of a party which has appeared as shown in its submission;

(2) If a party has appeared in the case through an attorney, to the address of the attorney shown in the party's submission or in a notice of appearance;

(3) If SBA is the party, unless an attorney has been specified in SBA's submissions to OHA, by mailing to: Office of General Counsel, Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

(b) *Filing.* (1) All pleadings and other submissions must be filed with OHA by personal delivery, first-class mail, express mail, facsimile transmission, or commercial delivery service. Filing may only be accomplished at the following address: Office of Hearings and Appeals, Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

(2) If filing is by personal delivery or commercial delivery service, such filing must be accomplished between the hours of 8:30 a.m. and 5:00 p.m. If filing is by facsimile transmission, the telephone number to be used may be obtained by calling OHA.

(c) *Copies.* Only the original of a pleading or other submission must be filed with OHA. In the case of a document offered as evidence, an authenticated copy may be filed instead of the original.

(d) *Certificate of service.* A signed certificate stating how and when service was made on all parties must be attached to each pleading or other submission filed with OHA.

(e) *Date.* Unless otherwise specified by the Judge, the date of service or filing is as follows:

(1) If by facsimile transmission, the date of transmission.

(2) If by first-class mail, the date of postmark. Where the postmark is illegible or incomplete, there is a rebuttable presumption that the postmark was dated five days prior to the date of receipt.

(3) If by personal delivery, express mail, or commercial delivery service, the date of receipt.

(f) *Confidential information.* Any information in pleadings or other submissions that is believed by the submitting party to constitute proprietary or confidential information need not be served upon parties so long as the deletions are clearly identified and generally described in the documents which are served. Upon motion, the Judge may direct that the withheld information be provided to other parties, subject to any appropriate protective order.

§ 134.205 Motion for a more definite statement.

(a) *Procedure.* No later than 20 days after service of the petition or order to show cause, the respondent may serve and file a motion requesting a more definite statement of particular allegations in the petition.

(b) *Stay.* The serving and filing of a motion for a more definite statement stays the time for serving and filing an answer. The Judge will establish the time for serving and filing an answer.

§ 134.206 The answer.

(a) A respondent must serve and file an answer within 45 days after the service of a petition or order to show cause, except that debt collection proceeding answers are due within 30 days.

(b) The answer must contain the following:

(1) An admission or denial of each of the factual allegations contained in the petition or order to show cause, or a statement that the respondent denies knowledge or information sufficient to determine the truth of a particular allegation;

(2) Any affirmative defenses; and

(3) The name, address, telephone number, and signature of the respondent or its attorney.

(c) Allegations in the petition or order to show cause which are not answered in accordance with paragraph

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(b)(1) of this section will be deemed admitted unless injustice would occur.

(d) Upon an appeal from an SBA determination concerning the 8(a) program, SBA must serve and file the administrative record pertaining to that determination within the same time period applicable to the service and filing of its answer. If SBA fails to do so, the Judge will issue an order directing SBA to serve and file the administrative record by a specified date.

(e) If the respondent fails to serve and file an answer within the time period set forth in paragraph (a) of this section, or within any extended time period granted by the Judge, that failure will constitute a default. Following such a default, the respondent may be prohibited from participating further in the case, except to serve and file the administrative record in accordance with paragraph (d) of this section.

§ 134.207 Amendments and supplemental pleadings.

(a) *Amendments.* Upon motion, and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the service and filing of amendments to pleadings. However, an amendment will not be permitted if it would cause unreasonable delay in the determination of the matter.

(b) *Supplements.* Upon motion, and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the service and filing of a supplemental pleading setting forth relevant transactions or occurrences that have taken place since the filing of the original pleading.

(c) *8(a) appeals.* In 8(a) program appeals, amendments to pleadings and supplemental pleadings will be permitted by the Judge only upon a showing of good cause.

(d) *Answer.* In an order permitting the serving and filing of an amended or supplemented petition or order to show cause, the Judge will establish the time for serving and filing an answer.

§ 134.208 Representation in cases before OHA.

(a) A party may represent itself, or be represented by a duly licensed attorney. A member of a partnership may represent the partnership, and an offi-

cer may represent a corporation, trust, or association.

(b) An attorney for a party who did not appear on behalf of that party in the party's first filing with OHA must serve and file a written notice of appearance.

(c) An attorney seeking to withdraw from a case must serve and file a motion for the withdrawal of his or her appearance.

§ 134.209 Requirement of signature.

Every written submission to OHA, other than evidence, must be signed by the party filing that submission, or by the party's attorney. By signing the submission, a party or its attorney attests that the statements and allegations in that submission are true to the best of its knowledge, and that the submission is not being filed for the purpose of delay or harassment.

§ 134.210 Intervention.

(a) *By SBA.* SBA may intervene as of right at any time in any case until final decision.

(b) *By interested persons.* Any individual, partnership, association, corporation, trust, or governmental agency may move to intervene at any time until final decision by serving and filing a motion to intervene containing a statement of the movant's interest in the case and the necessity for intervention to protect such interest. The Judge may grant leave to intervene upon such terms as he or she deems appropriate.

§ 134.211 Motions.

(a) *Contents.* All motions must state the relief being requested, as well as the grounds and any authority for that relief.

(b) *Response.* No later than 20 days after the service of a motion, all non-moving parties must serve and file a response or be deemed to have consented to the relief sought. Unless the Judge directs otherwise, the moving party will have no right to reply to a response, nor will oral argument be heard on the motion.

(c) *Service of orders.* OHA will serve upon all parties any written order issued in response to a motion.

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(d) *Stay*. A motion to dismiss stays the time to answer. The Judge will establish the time for serving and filing an answer in the order determining the motion to dismiss.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998]

§ 134.212 Summary decision.

(a) *Grounds*. A party may move for summary decision at any time as to all or any portion of the case, on the grounds that there is no genuine issue as to any material fact, and that the moving party is entitled to a decision in its favor as a matter of law.

(b) *Contents of motion*. The motion must include a statement of the material facts believed not to be disputed, and relevant law. Supporting affidavits may also be included.

(c) *Cross-motions*. In its response to a motion for summary decision, a party may cross-move for summary decision. The initial moving party may serve and file a response to any cross-motion for summary decision within 20 days after the service of that cross-motion.

(d) *Stay*. A motion for summary decision stays the time to answer. The Judge will establish the time for serving and filing an answer in the order determining the motion for summary decision.

§ 134.213 Discovery.

(a) *Motion*. A party may obtain discovery only upon motion, and for good cause shown.

(b) *Forms*. The forms of discovery which a Judge can order under paragraph (a) of this section include requests for admissions, requests for production of documents, interrogatories, and depositions.

(c) *Limitations*. Discovery may be limited in accordance with the terms of a protective order. Further, privileged information and irrelevant issues or facts will not be subject to discovery.

(d) *Disputes*. If a dispute should arise between the parties over a particular discovery request, the party seeking discovery may serve and file a motion to compel discovery. Discovery may be opposed on the grounds of harassment, needless embarrassment, irrelevance,

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undue burden or expense, privilege, or confidentiality.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998]

§ 134.214 Subpoenas.

(a) *Availability*. At the request of a party, or upon his or her own initiative, a Judge may issue a subpoena requiring a witness to appear and testify, or to produce particular documents, at a specified time and place.

(b) *Requests*. A request for the issuance of a subpoena must be written, served upon all parties, and filed. The request must clearly identify the witness and any documents to be subpoenaed, and must set forth the relevance of the testimony or documents sought.

(c) *Service*. A subpoena may only be served by personal delivery. The individual making service shall prepare an affidavit stating the date, time, and place of the service. The party which obtained the subpoena must serve upon all other parties, and file with OHA, a copy of the subpoena and affidavit of service within 2 days after service is made.

(d) *Motion to quash*. A motion to limit or quash a subpoena must be served and filed within 10 days after service of the subpoena, or by the return date of the subpoena, whichever date comes first. Any response to the motion must be served and filed within 10 days after service of the motion, unless a shorter time is specified by the Judge. No oral argument will be heard on the motion unless the Judge directs otherwise.

§ 134.215 Interlocutory appeals.

(a) *General*. A motion for leave to take an interlocutory appeal from a Judge's ruling will not be entertained in those proceedings in which OHA issues final decisions. In all other cases, an interlocutory appeal will be permitted only if, upon motion by a party, or upon the Judge's own initiative, the Judge certifies that his or her ruling raises a question which is immediately appealable. Interlocutory appeals will be decided by the AA/OHA or a designee.

(b) *Motion for certification*. A party must serve and file a motion for certification no later than 20 days after

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issuance of the ruling to which the motion applies. A denial of the motion does not preclude objections to the ruling in any subsequent request for review of an initial decision.

(c) *Basis for certification.* The Judge will certify a ruling for interlocutory appeal only if he or she determines that:

(1) The ruling involves an important question of law or policy about which there is substantial ground for a difference of opinion; and

(2) An interlocutory appeal will materially expedite resolution of the case, or denial of an interlocutory appeal would cause undue hardship to a party.

(d) *Stay of proceedings.* A stay while an interlocutory appeal is pending will be at the discretion of the Judge.

§ 134.216 Alternative dispute resolution procedures.

At any time during the pendency of a case, the parties may submit a joint motion requesting that the Judge permit the use of alternative dispute resolution procedures to assist in resolving the matter. If the motion is granted, the Judge will also stay the proceedings before OHA, in whole or in part, as he or she deems appropriate, pending the outcome of the alternative dispute resolution procedures.

§ 134.217 Settlement.

At any time during the pendency of a case, the parties may submit a settlement agreement, signed by all settling parties, to the Judge. Settlement negotiations, and rejected settlement agreements, are not admissible into evidence.

§ 134.218 Judges.

(a) *Assignment.* The AA/OHA will assign all cases subject to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, to an Administrative Law Judge. The AA/OHA will assign all other cases before OHA to either an Administrative Law Judge or an Administrative Judge, or, if the AA/OHA is a duly licensed attorney, to himself or herself.

(b) *Authority.* Except as otherwise limited by this part, or by statute or other regulation, a Judge has the authority to take all appropriate action to ensure the efficient, prompt, and

fair determination of a case, including, but not limited to, the authority to administer oaths and affirmations and to subpoena and examine witnesses.

(c) *Recusal.* Upon the motion of a party, or upon the Judge's own initiative, a Judge will promptly recuse himself or herself from further participation in a case whenever disqualification is appropriate due to conflict of interest, bias, or some other significant reason. A denial of a motion for recusal may be immediately appealed to the AA/OHA, or to the Administrative Law Judge if the AA/OHA is the Judge, but that appeal will not stay proceedings in the case.

§ 134.219 Sanctions.

A Judge may impose appropriate sanctions, except for fees, costs, or monetary penalties, which he or she deems necessary to serve the ends of justice, if a party or its attorney:

(a) Fails to comply with an order of the Judge;

(b) Fails to comply with the rules set forth in this part;

(c) Acts in bad faith or for purposes of delay or harassment;

(d) Submits false statements knowingly, recklessly, or with deliberate disregard for the truth; or

(e) Otherwise acts in an unethical or disruptive manner.

§ 134.220 Prohibition against ex parte communications.

No person shall consult or communicate with a Judge concerning any fact, question of law, or SBA policy relevant to the merits of a case before that Judge except on prior notice to all parties, and with the opportunity for all parties to participate. In the event of such prohibited consultation or communication, the Judge will disclose the occurrence in accordance with 5 U.S.C. 557(d)(1), and may impose such sanctions as he or she deems appropriate.

§ 134.221 Prehearing conferences.

Prior to a hearing, the Judge, at his or her own initiative, or upon the motion of any party, may direct the parties or their attorneys to appear, by telephone or in person, in order to consider any matter which may assist in

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the efficient, prompt, and fair determination of the case. The conference may be recorded verbatim at the discretion of the Judge, and, if so, a party may purchase a transcript, at its own expense, from the recording service.

§ 134.222 Oral hearing.

(a) *Availability.* A party may obtain an oral hearing only if:

(1) It is required by regulation; or

(2) Following the motion of a party, or at his or her own initiative, the Judge orders an oral hearing upon concluding that there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses.

(b) *Place and time.* The place and time of oral hearings is within the discretion of the Judge, who shall give due regard to the necessity and convenience of the parties, their attorneys, and witnesses. The Judge may direct that an oral hearing be conducted by telephone.

(c) *Public access.* Unless otherwise ordered by the Judge, all oral hearings are public.

(d) *Payment of subpoenaed witnesses.* A party which obtains a witness' presence at an oral hearing by subpoena, must pay to that witness the fees and mileage costs to which the witness would be entitled in Federal Court.

(e) *Recording.* Oral hearings will be recorded verbatim. A transcript of a recording may be purchased by a party, at its own expense, from the recording service.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998]

§ 134.223 Evidence.

(a) *Federal Rules of Evidence.* Unless contrary to a particular rule in this part, or an order of the Judge, the Federal Rules of Evidence will be used as a general guide in all cases before OHA.

(b) *Hearsay.* Hearsay evidence is admissible if it is deemed by the Judge to be relevant and reliable.

§ 134.224 Standards for decision.

The decision of a Judge will be based upon a preponderance of the evidence.

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§ 134.225 The record.

(a) *Contents.* The record of a case before OHA will consist of all pleadings, motions, and other non-evidentiary submissions, all admitted evidence, all orders and decisions, and any transcripts of proceedings in the case.

(b) *Public access.* Except for information subject to a protective order, proprietary or confidential information withheld in accordance with this part, or any other information which is excluded from disclosure by law or regulation, the record will be available at OHA for public inspection during normal business hours. Copies of the documents available for public inspection may be obtained by the public upon payment of any duplication charges.

(c) *Closure.* The Judge will set the date upon which the pre-decisional record of the case will be closed, and after which no additional evidence or argument will be accepted.

§ 134.226 The decision.

(a) *Contents.* Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of relevant law, reasons for such findings and conclusions, and any relief ordered. The contents of the record will constitute the exclusive basis for a decision.

(b) *Time limits.* Decisions pertaining to the collection of debts owed to SBA and the United States under the Debt Collection Act of 1982 and part 140 of this chapter must be rendered within 60 days after a petition is filed.

(c) *Service.* OHA will serve a copy of all written decisions on:

(1) Each party, or, if represented by counsel, on its counsel; and

(2) SBA's General Counsel, or his or her designee, if SBA is not a party.

§ 134.227 Finality of decisions.

(a) *Final decisions.* A decision on the merits shall be a final decision, upon issuance, in proceedings concerning the collection of debts owed to SBA and the United States, under the Debt Collection Act of 1982 and part 140 of this chapter.

(b) *Initial decisions.* All decisions on the merits other than those set forth in paragraph (a) of this section are initial decisions. However, unless a request for

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review is filed pursuant to § 134.228(a), an initial decision shall become the final decision of SBA 30 days after its issuance.

§ 134.228 Review of initial decisions.

(a) *Request for review.* Within 30 days after the service of an initial decision, any party, or SBA's Office of General Counsel, may serve and file with OHA a request for review. A request for review must set forth the filing party's specific objections to the initial decision, and any alleged support for those objections in the record, or in case law, statute, regulation, or SBA policy. A party must serve its request for review upon all other parties and upon SBA's Office of General Counsel.

(b) *Response.* Within 20 days after the service of a request for review, any party, or SBA's Office of General Counsel, may serve and file with OHA a response. A party must serve its response upon all other parties and upon SBA's Office of General Counsel.

(c) *Transfer of the record.* Upon receipt of all responses, or 30 days after the filing of a request for review, whichever is earlier, OHA will transfer the record of the case to the Administrator. The Administrator, or his or her designee, will then review the record.

(d) *Standard of review.* Upon review, the Administrator, or his or her designee, will sustain the initial decision unless it is based on an erroneous finding of fact or an erroneous interpretation or application of case law, statute, regulation, or SBA policy.

(e) *Order.* The Administrator, or his or her designee, will:

(1) Affirm, reverse, or modify the initial decision, which determination will become the final decision of the SBA upon issuance; or

(2) Remand the initial decision to the Judge for appropriate further proceedings.

§ 134.229 Termination of jurisdiction.

The jurisdiction of OHA will terminate upon the issuance of a decision by a Judge resolving all material issues of fact and law unless the case is subsequently remanded for appropriate further proceedings, pursuant to § 134.228(e) (2).

Subpart C—Rules of Practice for Appeals From Size Determinations and SIC Code Designations

§ 134.301 Scope of the rules in this subpart C.

The rules of practice in this subpart C apply to all appeals to OHA from:

(a) Formal size determinations made by an SBA Government Contracting Area Office, under part 121 of this chapter, or by a Disaster Area Office, in connection with applications for disaster loans; and

(b) SIC code designations, pursuant to part 121 of this chapter.

§ 134.302 Who may appeal.

Appeals from size determinations and SIC code designations may be filed with OHA by the following, as applicable:

(a) Any person adversely affected by a size determination;

(b) Any person adversely affected by a SIC code designation. However, with respect to an 8(a) contract, only the Associate Administrator for Minority Enterprise Development may appeal a SIC code designation;

(c) The Associate or Assistant Administrator for the SBA program involved, through SBA's Office of General Counsel; or

(d) The procuring agency contracting officer responsible for the procurement affected by a size determination.

§ 134.303 No absolute right to an appeal from a size determination.

It is within the discretion of the Judge whether to accept an appeal from a size determination. If the Judge decides not to consider such an appeal, he or she will issue an order denying review, and specifying the reasons for the decision.

§ 134.304 Commencement of appeals from size determinations and SIC code designations.

(a) Appeals from size determinations and SIC code designations must be commenced by serving and filing an appeal petition as follows:

(1) If appeal is from a size determination in a pending procurement or pending Government property sale, then the

appeal petition must be served and filed within 15 days after service of the size determination;

(2) If appeal is from a size determination other than one in a pending procurement or pending Government property sale, then the appeal petition must be served and filed within 30 days after service of the size determination;

(3) If appeal is from a SIC code designation, then the appeal petition must be served and filed within 10 days after the issuance of the initial invitation for bids or initial request for proposals or quotations.

(b) An untimely appeal will be dismissed. However, an appeal which is untimely under paragraph (a)(1) of this section, with respect to a pending procurement or sale, may, if timely under paragraph (a)(2) of this section, proceed with respect to future procurements or sales.

§ 134.305 The appeal petition.

(a) *Form.* There is no required format for an appeal petition. However, it must include the following information:

(1) The Area Office which issued the size determination, or the contracting office which designated the SIC code;

(2) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;

(3) A full and specific statement as to why the size determination or SIC code designation is alleged to be in error, together with argument supporting such allegations; and

(4) The name, address, telephone number, and signature of the appellant or its attorney.

(b) *Service of size determination appeals.* The appellant must serve the appeal petition upon each of the following:

(1) The SBA official who issued the size determination;

(2) The contracting officer responsible for the procurement affected by a size determination;

(3) The business concern whose size status is at issue;

(4) All persons who filed protests; and

(5) SBA's Office of General Counsel.

(c) *Service of SIC appeals.* The appellant must serve the contracting officer who made the SIC code designation.

(d) *Certificate of service.* The appellant must attach to the appeal petition a signed certificate identifying each person or governmental agency which was served with the notice of appeal, and how and when each of those persons or governmental agencies was served.

(e) *Dismissal.* An appeal petition which does not contain all of the information required in paragraph (a) of this section may be dismissed, with or without prejudice, by the Judge at his or her own initiative, or upon motion of a respondent.

§ 134.306 Transmission of the case file.

Upon receipt of an appeal petition pertaining to a size determination, the Area Office which issued the size determination must immediately send to OHA the entire case file relating to that determination. Upon receipt of an appeal petition pertaining to a SIC code designation, the contracting officer who designated the SIC code must immediately send to OHA the solicitation relating to that designation.

§ 134.307 Service and filing requirements.

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart.

§ 134.308 Limitation on new evidence and adverse inference from non-submission in appeals from size determinations.

(a) Evidence not previously presented to the Area Office which issued the size determination being appealed will not be considered by a Judge unless:

(1) The Judge, on his or her own initiative, orders the submission of such evidence; or

(2) A motion is served and filed establishing good cause for the submission of such evidence.

(b) If the submission of evidence is ordered by a Judge, and the party in possession of that evidence does not submit it, the Judge may draw adverse inferences against that party.

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§ 134.309 Response to an appeal petition.

(a) *Who may respond.* Any person served with an appeal petition, or any other interested person, may serve and file a response supporting or opposing the appeal. The response should present argument.

(b) *Time limits.* Unless otherwise specified by the Judge, a respondent must serve and file a response within 10 days after service of the appeal petition upon it.

(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.305.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

§ 134.310 Discovery.

Discovery will not be permitted in appeals from size determinations or SIC code designations.

§ 134.311 Oral hearings.

Oral hearings will not be held in appeals from SIC code designations, and will be held in appeals from size determinations only upon a finding by the Judge of extraordinary circumstances. If such an oral hearing is ordered, the proceeding shall be conducted in accordance with those rules of subpart B of this part as the Judge deems appropriate.

§ 134.312 Evidence.

To the extent the rules in this subpart permit the submission of evidence, the provisions of § 134.223 (a) and (b) apply.

§ 134.313 Applicability of subpart B provisions.

The following sections from subpart B of this part apply to an appeal under this subpart C: § 134.207(a) (pertaining to amendments to pleadings); § 134.208 (Representation in cases before OHA); § 134.209 (Requirement of signature); § 134.210 (Intervention); § 134.211 (Motions); § 134.214 (Subpoenas); § 134.218 (Judges); § 134.219 (Sanctions); and § 134.220 (Prohibition against *ex parte* communications).

§ 134.314 Standard of review.

The standard of review is whether the size determination or SIC code designation was based on clear error of fact or law.

§ 134.315 The record.

Where relevant, the provisions of § 134.225 (a), (b), and (c) apply. In an appeal under this subpart, the contents of the record also include the case file or solicitation submitted to OHA in accordance with § 134.306.

§ 134.316 The decision.

(a) *Contents.* Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of law, reasons for such findings and conclusions, and any relief ordered.

(b) *Finality.* The decision is the final decision of the SBA and becomes effective upon issuance.

(c) *Service.* OHA will serve a copy of all written decisions on:

- (1) Each party, or, if represented by counsel, on its counsel; and
- (2) SBA's General Counsel, or his or her designee, if SBA is not a party.

§ 134.317 Termination of jurisdiction.

The jurisdiction of OHA will terminate upon the issuance of a decision.

§ 134.318 Return of the case file.

Upon termination of jurisdiction, OHA will return the case file to the transmitting Area Office. The remainder of the record will be retained by OHA.

Subpart D—Rules of Practice for Appeals Under the 8(a) Program

SOURCE: 63 FR 35766, June 30, 1998, unless otherwise noted.

§ 134.401 Scope of the rules in this subpart D.

The rules of practice in this subpart D apply to all appeals to OHA from:

- (a) Denials of 8(a) BD program admission based solely on a negative finding(s) of social disadvantage, economic disadvantage, ownership or control pursuant to § 124.206 of this title;
- (b) Early graduation pursuant to §§ 124.302 and 124.304;

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(c) Termination pursuant to §§ 124.303 and 124.304;

(d) Denials of requests to issue a waiver pursuant to § 124.515; and

(e) Suspensions pursuant to § 124.305(a).

§ 134.402 Appeal petition.

In addition to the requirements of § 134.203, an appeal petition must state, with specific reference to the determination and the record supporting such determination, the reasons why the determination is alleged to be arbitrary, capricious or contrary to law.

§ 134.403 Service of appeal petition.

(a) Concurrent with its filing with OHA, a concern must also serve SBA's AA/8(a)BD and the appropriate Associate General Counsel in SBA's Office of General Counsel with a copy of the petition, including attachments.

(1) For appeals relating to denials of program admission pursuant to § 124.206 of this title, suspensions of program assistance pursuant to § 124.305, or denials of requests for waivers pursuant to § 124.515, a petitioner must serve the SBA's Associate General Counsel for General Law.

(2) For appeals relating to early graduation pursuant to §§ 124.302 and 124.304 or termination pursuant to §§ 124.303 and 124.304, a petitioner must serve the SBA's Associate General Counsel for Litigation.

(3) Service on SBA's Office of General Counsel generally or the SBA General Counsel do not meet the service requirements of this section.

(b) Service should be addressed to the AA/8(a)BD and the applicable Associate General Counsel at the Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

§ 134.404 Decision by Administrative Law Judge.

Appeal proceedings brought under this subpart will be conducted by an Administrative Law Judge.

§ 134.405 Jurisdiction.

(a) The Administrative Law Judge selected to preside over an appeal shall decline to accept jurisdiction over any matter if:

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(1) The appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the determination, including appeals of denials of 8(a) BD program admission based in whole or in part on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control;

(2) The appeal is untimely filed under § 134.202 or is not otherwise filed in accordance with the requirements of this subpart or the requirements in subparts A and B of this part; or

(3) The matter has been decided or is the subject of an adjudication before a court of competent jurisdiction over such matters.

(b) Once the Administrative Law Judge accepts jurisdiction over an appeal, subsequent initiation of an adjudication of the matter by a court of competent jurisdiction will not preclude the Administrative Law Judge from rendering a final decision on the matter.

(c) Jurisdiction of the Administrative Law Judge in a suspension case is limited to the issue of whether the protection of the Government's interest requires suspension pending resolution of the termination action, unless the Administrative Law Judge has consolidated the suspension appeal with the corresponding termination appeal.

§ 134.406 Review of the administrative record.

(a) Except as provided in § 134.407, any proceeding conducted under this subpart shall be decided solely on a review of the written administrative record.

(b) The Administrative Law Judge's review is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is reasonable, the Administrative Law Judge must uphold it on appeal.

(c) The administrative record must contain all documents that are relevant to the determination on appeal before the Administrative Law Judge and upon which the SBA decision-maker relied. The administrative record, however, need not contain all

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documents pertaining to the petitioner. For example, the administrative record in a termination proceeding need not include the Participant's entire business plan file, documents pertaining to specific 8(a) contracts, or the firm's application for participation in the 8(a) BD program if they are unrelated to the termination action. The petitioner may object to the absence of a document, previously submitted to or sent by SBA, which the petitioner believes was erroneously omitted from the administrative record.

(d) Where the Agency files its answer to the appeal petition after the date specified in §134.206, the Administrative Law Judge may decline to consider the answer and base his or her decision solely on a review of the administrative record.

(e) The Administrative Law Judge may remand a case to the AA/8(a)BD (or, in the case of a denial of a request for waiver under §124.515 of this title, to the Administrator) for further consideration if he or she determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious or contrary to law, or where it is clearly apparent from the record that SBA made an erroneous factual finding (e.g., SBA double counted an asset of an individual claiming disadvantaged status) or a mistake of law (e.g., SBA applied the wrong regulatory provision in evaluating the case). Such a remand will be for a period of 10 working days.

§ 134.407 Evidence beyond the record and discovery.

(a) The Administrative Law Judge may not admit evidence beyond the written administrative record nor permit any form of discovery unless he or she first determines that the petitioner, upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.

(1) Prior to any such determination, the Administrative Law Judge must permit SBA to respond in writing to

any allegations of bad faith or improper behavior.

(2) Upon a determination by the Administrative Law Judge that the petitioner has made such a substantial showing, the Administrative Law Judge may permit appropriate discovery, and accept relevant evidence beyond the written administrative record, which is specifically limited to the alleged bad faith or improper behavior.

(b) A determination by the Administrative Law Judge that the required showing set forth in paragraph (a) of this section has been made does not shift the burden of proof, which continues to rest with the petitioner.

§ 134.408 Decision on appeal.

(a) A decision of the Administrative Law Judge under this subpart is the final agency decision, and is binding on the parties.

(b) The Administrative Law Judge shall issue a decision, insofar as practicable, within 90 days after an appeal petition is filed. If the Administrative Law Judge does not issue a decision within 90 days after an appeal petition is filed, he or she must indicate the reason that the 90-day time limit has not been met in the decision, when issued.

(c) The Administrative Law Judge may reconsider an appeal decision within 20 days of the decision if there is a clear showing of an error of fact or law material to the decision.

Subpart E—Implementation of the Equal Access to Justice Act

SOURCE: 61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998.

§ 134.501 What is the purpose of this subpart?

The Equal Access to Justice Act, 5 U.S.C. 504, establishes procedures by which prevailing parties in certain administrative proceedings may apply for reimbursement of fees and other expenses. Eligible parties may receive awards when they prevail over SBA, unless SBA's position in the proceeding was "substantially justified" or, as provided in §134.405(b), special circumstances make an award unjust. The

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rules of this subpart explain which OHA proceedings are covered, who may be eligible for an award of fees and expenses, and how to apply for such an award.

§ 134.502 Under what circumstances may I apply for reimbursement?

You may apply for reimbursement under this subpart if you meet the eligibility requirements in §134.406 and you prevail over SBA in a final decision in:

- (a) The type of administrative proceeding which qualifies as an “adversary adjudication” under §134.403; or
- (b) An ancillary or subsidiary issue in that administrative proceeding that is sufficiently significant and discrete to merit treatment as a separate unit; or
- (c) A matter which the agency orders to be determined as an “adversary adjudication” under 5 U.S.C. 554.

§ 134.503 What is an adversary adjudication?

For purposes of this subpart, adversary adjudications are administrative proceedings before OHA which involve SBA as a party and which are required to be conducted by an Administrative Law Judge (“ALJ”). These adjudications (“administrative proceedings”) include those proceedings listed in §134.102 (a), (i), and (j)(1), but do not include other OHA proceedings such as those listed in §134.102(k). In order for an administrative proceeding to qualify, SBA must have been represented by counsel or by another representative who enters an appearance and participates in the proceeding.

§ 134.504 What benefits may I claim?

You may seek reimbursement for certain reasonable fees and expenses incurred in prosecuting or defending a claim in an administrative proceeding.

§ 134.505 Under what circumstances are fees and expenses reimbursable?

- (a) If you are a prevailing eligible party, you may receive an award for reasonable fees and expenses unless the position of the agency in the proceeding is found by the ALJ to be “sub-

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stantially justified”, or special circumstances exist which make an award unjust. The “position of the agency” includes not only the position taken by SBA in the administrative proceeding, but also the position which it took in the action which led to the administrative proceeding. No presumption arises that SBA’s position was not substantially justified simply because it did not prevail in a proceeding. However, upon your assertion that the position of SBA was not substantially justified, SBA will be required to establish that its position was reasonable in fact and law.

- (b) The ALJ may reduce or deny an award for reimbursement if you have unreasonably protracted the administrative proceeding or if other special circumstances would make the award unjust.
- (c) Awards for fees and expenses incurred before the date on which an administrative proceeding was initiated are allowable only if you can demonstrate that they were reasonably incurred in preparation for the proceeding.

§ 134.506 Who is eligible for possible reimbursement?

- (a) You are eligible for possible reimbursement if:

- (1) You are an individual, owner of an unincorporated business, partnership, corporation, association, organization, or unit of local government; and
- (2) You are a party, as defined in 5 U.S.C. 551(3); and
- (3) You are the prevailing party; and
- (4) You meet certain net worth and employee eligibility requirements set forth in §134.407.

- (b) You are not eligible for possible reimbursement if you participated in the administrative proceeding only on behalf of persons or entities that are ineligible.

§ 134.507 How do I know which eligibility requirement applies to me?

Follow this chart to determine your eligibility. You should calculate your net worth and the number of your employees as of the date the administrative proceeding was initiated.

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| If your participation in the proceeding was: | Eligibility requirements: |
|--|--|
| (1) As an individual rather than a business owner | (1) Personal net worth may not exceed 2 million dollars. |
| (2) As owner of an unincorporated business | (2) Personal net worth may not exceed 7 million dollars, and No more than 500 employees. |
| (3) As a partnership, corporation, association, organization, or unit of local government. | (3) Business net worth may not exceed 7 million dollars, and No more than 500 employees. |
| (4) As a charitable or other tax-exempt organization described in 26 U.S.C. 501(c)(3) or a cooperative association as defined in 12 U.S.C. 1141j(a). | (4) No net worth limitations, and No more than 500 employees. |

§ 134.508 What are the special rules for calculating net worth and number of employees?

(a) Your net worth must include the value of any assets disposed of for the purpose of meeting an eligibility standard, and must exclude any obligation incurred for that purpose. Transfers of assets, or obligations incurred, for less than reasonably equivalent value will be presumed to have been made for the purpose of meeting an eligibility standard.

(b) If you are an owner of an unincorporated business, or a partnership, corporation, association, organization, or unit of local government, your net worth must include the net worth of all of your affiliates. "Affiliates" are:

(1) Corporations or other business entities which directly or indirectly own or control a majority of the voting shares or other ownership interests in the applicant concern; and

(2) Corporations or other business entities in which the applicant concern directly or indirectly owns or controls a majority of the voting shares or other ownership interests.

(c) Your employees include all those persons regularly working for you at the time the administrative proceeding was initiated, whether or not they were at work on that date. Part-time employees must be included on a proportional basis. You must include the employees of all your affiliates in your total number of employees.

§ 134.509 What is the difference between a fee and an expense?

A fee is a charge to you for the professional services of attorneys, agents, or expert witnesses rendered in connection with your case. An expense is the cost to you of any study, analysis, engineering report, test, project, or similar matter prepared in connection with your case.

§ 134.510 Are there limitations on reimbursement for fees and expenses?

(a) Awards will be calculated on the basis of fees and expenses actually incurred. If services were provided by one or more of your employees, or were made available to you free, you may not seek an award for those services. If services were provided at a reduced rate, fees and expenses will be calculated at that reduced rate.

(b) In determining the reasonableness of the fees for attorneys, agents or expert witnesses, the ALJ will consider at least the following:

(1) That provider's customary fee for like services;

(2) The prevailing rate for similar services in the community in which that provider ordinarily performs services;

(3) The time actually spent in representing you; and

(4) The time reasonably spent in light of the difficulty and complexity of the issues.

(c) An award for the fees of an attorney or agent may not exceed \$75 per hour, and an award for the fees of an expert witness may not exceed \$25 per hour, regardless of the rate charged.

(d) An award for the reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on your behalf may not exceed the prevailing rate payable for similar services, and you may be reimbursed only if the study or other matter was necessary to the preparation of your case.

§ 134.511 What should I include in my application for an award?

(a) Your application must be in the form of a written petition which is served and filed in accordance with § 134.204. It must contain the following information:

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(1) A statement that OHA has jurisdiction over the case pursuant to § 134.102(g);

(2) Identification of the administrative proceeding for which you are seeking an award;

(3) A statement that you have prevailed, and a list of each issue in which you claim the position of SBA was not substantially justified;

(4) Your status as an individual, owner of an unincorporated business, partnership, corporation, association, organization, or unit of local government;

(5) Your net worth and number of employees as of the date the administrative proceeding was initiated, or a statement that one or both of these eligibility requirements do not apply to you;

(6) The amount of fees and expenses you are seeking, along with the invoice

or billing statement from each service provider;

(7) A description of any affiliates (as that term is defined in § 134.408), or a statement that no affiliates exist;

(8) A statement that the application and any attached statements and exhibits are true and complete to the best of your knowledge and that you understand a false statement on these documents is a felony punishable by fine and imprisonment under 18 U.S.C. 1001; and

(9)(i) Your name and address;

(ii) Your signature, or the signature of either a responsible official or your attorney; and

(iii) The address and telephone number of the person who signs the application.

(b) You should follow this chart to determine which further documents must be included with your application:

| Party | Required documents |
|---|---|
| (1) Individual, owner of unincorporated business, partnership, corporation, association, organization, or unit of local government. | (1) Net worth exhibit. |
| (2) Organization qualified as tax-exempt under 26 U.S.C. 501(c)(3). | (2) Copy of a ruling by the Internal Revenue Service that you qualify as a 501(c)(3) organization or Statement that you were listed in the current edition of IRS Bulletin 78 as of the date the administrative proceeding was initiated. |
| (3) Tax-exempt religious organization not required to obtain a ruling from the Internal Revenue Service on its exempt status. | (3) Description of your organization and the basis for your belief you are exempt. |
| (4) Cooperative association as defined in 12 U.S.C. 1141j(a) ... | (4) Copy of your charter or articles of incorporation, and Copy of your bylaws. |

§ 134.512 What must a net worth exhibit contain?

(a) A net worth exhibit may be in any format, but it must contain:

(1) List of all assets and liabilities for you and each affiliate in detail sufficient to show your eligibility;

(2) Aggregate net worth for you and all affiliates; and

(3) Description of any transfers of assets from, or obligations incurred by, you or your affiliates within one year prior to the initiation of the administrative proceeding which reduced your net worth below the eligibility ceiling, or a statement that no such transfers occurred.

(b) The net worth exhibit must be filed with your application, but will not be part of the public record of the

proceeding. Further, in accordance with the provisions of § 134.204(g), you need not serve your net worth exhibit on other parties.

§ 134.513 What documentation do I need for fees and expenses?

You must submit a separate itemized statement or invoice for the services of each provider for which you seek reimbursement. Each separate statement or invoice must contain:

(a) The hours worked in connection with the proceeding by each provider supplying a billable service;

(b) A description of the specific services performed by each provider;

(c) The rate at which fees were computed for each provider;

(d) The total charged by the provider on that statement or invoice; and

(e) The provider's verification that the statement or invoice is true to the best of his or her knowledge and that he or she understands that a false statement is punishable by fine and imprisonment under 18 U.S.C. 1001.

§ 134.514 What deadlines apply to my application for an award and where do I send it?

After you have prevailed in an administrative proceeding or in a discrete issue therein, you must serve, and file with OHA, your written application for an award, and its attachments, no later than 30 days after the decision in the administrative proceeding becomes final under § 134.227. The deadline for filing an application for an award may not be extended. If SBA or another party requests review of the decision in the underlying administrative proceeding, your request for an award for fees and expenses may still be filed, but it will not be considered by the ALJ until a final decision is rendered.

§ 134.515 How will proceedings relating to my application for fees and expenses be conducted?

Proceedings will be conducted in accordance with the provisions in subpart B of this part.

§ 134.516 How will I know if I receive an award?

The ALJ will issue an initial decision on the merits of your request for an award which will become final in 30 days unless a request for review is filed under § 134.228. The decision will include findings on your eligibility, on whether SBA's position was substantially justified, and on the reasonableness of the amount you requested. Where applicable, there will also be findings on whether you have unduly protracted the proceedings or whether other circumstances make an award unjust, and an explanation of the reason for the difference, if any, between the amount requested and the amount awarded. If you have sought an award against more than one federal agency, the decision will allocate responsibility

for payment among the agencies with appropriate explanation.

§ 134.517 May I seek review of the ALJ's decision on my award?

You may request review of the ALJ's decision on your award by filing a request for review in accordance with § 134.228. You may seek judicial review of a final decision as provided in 5 U.S.C. 504(c)(2).

§ 134.518 How are awards paid?

If you are seeking payment of an award, you must submit a copy of the final decision, along with your certification that you are not seeking judicial review of either the decision in the adversary adjudication, or of the award, to the following address: Chief Financial Officer, Office of Financial Operations, SBA, P.O. Box 205, Denver, CO 80201-0205. SBA will pay you the amount awarded within 60 days of receipt of your request unless it is notified that you or another party has sought judicial review of the underlying decision or the award.

PART 136—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE SMALL BUSINESS ADMINISTRATION

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AUTHORITY: 29 U.S.C. 794.

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SOURCE: 53 FR 19760, May 31, 1988, unless otherwise noted.

§ 136.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 136.102 Application.

This part applies to all programs or activities conducted by the Small Business Administration except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 136.103 Definitions.

For purposes of this part, the term—
Agency means the Small Business Administration.

Assistant Attorney General. *Assistant Attorney General* means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the Agency's alleged discriminatory actions in sufficient detail to inform the Agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or

by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Agency as constituting such a limitation;

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(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the Agency as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to any Agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(3) For purposes of employment, a person who qualifies under the definition contained at 29 CFR 1613.702(f), which is made applicable to this part by § 136.140.

Respondent means the organizational unit in which a complainant alleges that discrimination occurred.

Section 504 means section 504 of the Rehabilitation Act of 1973 ((Pub. L. 93-112, 87 Stat. 394) (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by SBA and not to activities of recipients of assistance from SBA.

§§ 136.104-136.109 [Reserved]

§ 136.110 Self-evaluation.

(a) The Agency shall, by July 17, 1989, evaluate its current policies and practices, and the effects thereof, that do

not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the Agency shall proceed to make the necessary modifications.

(b) The Agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Agency shall, for at least three years following the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 136.111 Notice.

The Agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the Agency, and make such information available to them in such manner as the Administrator finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

§§ 136.112-136.129 [Reserved]

§ 136.130 General prohibition against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Agency.

(b) The Agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(1) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(2) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(3) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(4) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(5) Deny a qualified individual with handicaps the opportunity to participate as a member of planning, voluntary (such as SCORE or Ace) or advisory boards; or

(6) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(c) The Agency shall permit a qualified individual with handicaps the opportunity to participate in any of the Agency's programs or activities, despite the existence of permissibly separate or different programs or activities especially designed to accommodate qualified individuals with handicaps.

(d) The Agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(1) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(2) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(e) The Agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would:

(1) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimi-

nation under any program or activity conducted by the Agency; or

(2) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(f) The Agency, in the selection of procurement contactors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(g) The Agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the Agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Agency are not, themselves, covered by this part.

(h) The exclusion of individuals without handicaps from the benefits of a program limited by Federal statute or Executive Order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive Order to a different class of individuals with handicaps is not prohibited by this part.

(i) The Agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 136.131–136.139 [Reserved]

§ 136.140 Employment.

(a) No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program, or activity conducted by the Agency.

(b) The definitions, requirements and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) as established by the EEOC in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 136.141–136.148 [Reserved]

§ 136.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 136.150, no qualified individual with handicaps shall, because the Agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Agency.

§ 136.150 Program accessibility: Existing facilities.

(a) *General.* The Agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the Agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the Agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Agency has the burden of proving that compliance with § 136.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Administrator or Deputy Administrator after considering all Agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. The Administrator or Deputy Administrator's decision shall be made within 30 days of the initial decision by Agency personnel that an action would result in such an alteration or burdens. If an action would result in such an alteration or such burdens, the Agency shall take any other action that would not result in such an alteration or such

burdens but would, nevertheless, ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The Agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aids to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The Agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The Agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the Agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The Agency shall comply with the obligations established under this section by September 13, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by July 15, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Agency shall develop, by January 16, 1989, a transition plan setting forth the steps necessary to complete such changes. The Agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made

available for public inspection. The plan shall, at a minimum:

- (1) Identify physical obstacles in the Agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;
- (2) Describe in detail the methods that will be used to make the facilities accessible;
- (3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
- (4) Indicate the official responsible for implementation of the plan.

§ 136.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600–101–19.607, apply to buildings covered by this section.

§§ 136.152–136.159 [Reserved]

§ 136.160 Communications.

- (a) The Agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.
 - (1) The Agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Agency.
 - (i) In determining what type of auxiliary aid is necessary, the Agency shall give primary consideration to the requests of the individual with handicaps.
 - (ii) The Agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.
 - (2) Where the Agency communicates with applicants and beneficiaries by

telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The Agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Agency shall provide a sign at each primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the Agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Agency has the burden of proving that compliance with § 136.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Administrator or Deputy Administrator after considering all Agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. The Administrator or Deputy Administrator's decision shall be made within 30 days of the initial decision by Agency personnel that an action would result in such an alteration or burdens. If an action required to comply with this section would result in such as alteration or such burdens, the Agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 136.161–136.169 [Reserved]

§ 136.170 Compliance procedures.

(a) *Applicability.* Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Agency.

(b) *Employment complaints.* The Agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by EEOC in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) *Filing a complaint*—(1) *Who may file.* Any person who believes that he or she has been subjected to discrimination prohibited by this part may file a complaint. An authorized representative of such person may file a complaint on his or her behalf. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class, or the authorized representative of a member of that class, may file a complaint.

(2) *Confidentiality.* The Chief, Office of Civil Rights Compliance (OCRC), shall hold in confidence the identity of any person submitting a complaint, unless the person submits written authorization otherwise, except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part, or to cooperate with the Office of Inspector General in the performance of its responsibilities under the Inspector General Act of 1978, as amended.

(3) *When to file.* Complaints shall be filed within 180 days of the alleged act of discrimination, except when this deadline is extended by the Chief, OCRC, for good cause shown. For purposes of determining when a complaint is timely filed under this paragraph, a complaint mailed to the Agency shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the Agency.

(4) *How to file.* Complaints may be delivered or mailed to the Chief, OCRC, Small Business Administration, 1441 L

Street NW.—Room 501, Washington, DC 20416. Any other SBA official receiving a complaint under this part shall forward such complaint immediately to the Chief, OCRC.

(d) *Notification to the Architectural and Transportation Barriers Compliance Board.* The agency shall promptly send to the Architectural and Transportation Barriers Compliance Board a copy of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended, 42 U.S.C. 4151–4157 is not readily accessible to and usable by individuals with handicaps.

(e) *Acceptance of complaint.* (1) The Chief, OCRC, shall accept a complete complaint that is filed in accordance with paragraph (c) of this section and over which the Agency has jurisdiction. The Chief, OCRC, shall notify the complainant and the respondent of receipt and acceptance of the complaint.

(2) If the Chief, OCRC, receives a complaint that is not complete, he or she shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to furnish the necessary information within 30 days of receipt of this notice, the Chief, OCRC, shall dismiss the complaint without prejudice.

(3) If the Chief, OCRC, receives a complaint over which the Agency does not have jurisdiction, he or she shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) *Investigation/Conciliation.* (1) Within 180 days of the receipt of a complete complaint the Chief, OCRC, shall complete the investigation of the complaint and attempt informal resolution. If no informal resolution is achieved, the Chief, OCRC, shall issue a letter of findings.

(2) The Chief, OCRC, may require Agency employees to cooperate in the investigation and attempted resolution of complaints. Employees who are required to participate in any investigation under this section shall do so as part of their official duties and during regular duty hours.

(3) The Chief, OCRC, shall furnish the complainant and the respondent with a

copy of the investigative report and provide the complainant and respondent with an opportunity for informal resolution of the complaint.

(4) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant and respondent. The written agreement may include a finding on the issue of discrimination and shall describe any corrective action to which the complainant and respondent have agreed.

(g) *Letter of findings.* If an informal resolution of the complaint is not reached, the Chief, OCRC, shall, within 180 days of receipt of the complete complaint, notify the complainant, the respondent and the Director, Office of Equal Employment Opportunity and Compliance (OEEOC), of the results of the investigation in a letter sent by certified mail, return receipt requested, and containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right of the complainant and respondent to appeal to the Director, OEEOC; and

(4) A notice of the right of the complainant and respondent to request a hearing.

The letter of findings becomes the final Agency decision if neither party files an appeal within the time prescribed in paragraph (h)(1) of this section. The Chief, OCRC, shall certify that the letter of findings is the final Agency decision on the complaint at the expiration of that time.

(h) *Filing an appeal.* (1) Any notice of appeal to the Director, OEEOC, with or without a request for hearing, shall be filed by the complainant or the respondent in writing with the Chief, OCRC, within 30 days of receipt from him or her of the letter required by paragraph (g) of this section. The notice shall be accompanied by a certificate of service attesting that the party has served a copy of his or her notice of appeal on all other parties to the proceeding. The Director, OEEOC, may extend this time limit for good cause

shown pursuant to the procedure in paragraph (h)(3) of this section.

(2) If a timely notice of appeal without a request for hearing is filed, any other party may file a written request for hearing within the time limit specified in paragraph (h)(1) of this section or within 10 days of his or her receipt of such notice of appeal, whichever is later.

(3) A party may appeal to the Director, OEEOC, from a decision of the Chief, OCRC, that an appeal is untimely. This appeal shall be filed with the Director, OEEOC, within 15 days of receipt of the decision from the Chief, OCRC.

(4) Any request for hearing will be construed as a request for an oral hearing. The complainant's failure to file a timely request for a hearing in accordance with this part shall constitute waiver of the right to a hearing, but shall not preclude his or her submitting written information and argument to the Director, OEEOC, in connection with his or her notice of appeal.

(i) *Acceptance of appeal.* The Chief, OCRC, shall accept and process any timely filed appeal.

(1) If a notice of appeal is filed but no party requests a hearing, the Chief, OCRC, shall promptly transmit the complaint file, the letter of findings and the notice of appeal to the Director, OEEOC.

(2) If a notice of appeal is filed and a party makes a timely request for a hearing, the Chief, OCRC, will transmit the notice of appeal, the request for hearing and the investigative file to the Office of Hearings and Appeals which office will assign the case to an administrative judge who will conduct a hearing in accordance with the procedures contained in 13 CFR part 134.

(j) *Decision.* (1) Where no request for a hearing is made, the Director, OEEOC, shall make the final Agency decision based on the contents of the complaint file, the letter of findings, the notice of appeal, and any responses to the notice of appeal filed by other parties. The decision shall be made within 60 days of receipt of the appeal or any response to the notice of appeal, whichever is applicable. If the Director, OEEOC, determines that he or she needs additional information from any party, he or she

shall request the information and provide the other party or parties an opportunity to respond to that information. The Director, OEEOC, shall have 60 days from receipt of the additional information or responses to such additional information, whichever is later, to make the decision. The Director, OEEOC, shall transmit his or her decision in writing to the parties. The decision shall set forth the findings, remedial actions, and reasons for the decision.

(2) Where a request for a hearing has been made, the administrative judge shall issue an initial decision, in writing, based on the hearing record, composed of the proposed findings of fact, conclusions of law, and remedies, to the parties and to the Director, OEEOC, within 30 days after receipt of the hearing transcripts, or within 30 days after the conclusion of the hearing if no transcript is made. This time limit may be extended with the permission of the Director, OEEOC. The decision of the administrative judge shall be deemed to be the final decision of the Agency after 30 days, unless a party files a petition for review with the Director, OEEOC, pursuant to 13 CFR 134.228(a) or the Director, OEEOC, issues an order stating his or her decision to review the initial decision, pursuant to 13 CFR 134.228(a). *See* 13 CFR 134.227(b).

(3) Where a petition for review is filed or a review is ordered by the Director, OEEOC, the Director, OEEOC, shall make the final decision of the Agency based on information in the complaint file, the letter of findings, the hearing record, the initial decision, the petition for review, and any responses to the petition or order. The decision shall be made within 60 days of receipt of the petition for review, the order, or any responses to such petition or order, whichever is later. If the Director, OEEOC, determines that he or she needs additional information from any party, he or she shall request the information and provide the other party or parties an opportunity to respond to that information. The Director, OEEOC, shall have 60 days from receipt of the additional information or responses to such additional information, whichever is later, to make the

decision. The Director, OEEOC, shall transmit his or her decision by letter to the parties. The decision shall set forth the findings, recommended remedial actions, and reasons for the decision. The decision shall adopt, reject, or modify the initial decision of the administrative judge. If the decision is to reject or modify the initial decision, the decision letter shall set forth in detail the specific reasons for the rejection or modification.

(4) Any respondent required to take action under the terms of the decision of the Agency shall do so promptly. The Chief, OCRC, may require periodic compliance reports specifying:

(i) The manner in which compliance with the provisions of the decision has been achieved;

(ii) The reasons any action required by the final decision has not been taken; and

(iii) The steps being taken to ensure full compliance.

(k) The time limit cited in paragraph (f) of this section may be extended with the permission of the Assistant Attorney General.

(l) The Agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[53 FR 19760, May 31, 1988, as amended at 61 FR 2691, Jan. 29, 1996]

PART 140—DEBT COLLECTION THROUGH OFFSET

Sec.

140.1 What does this part cover?

140.2 What is a debt and how can the SBA collect it through offset?

140.3 What rights do you have when SBA tries to collect a debt from you through offset?

AUTHORITY: 31 U.S.C. 3711, Collection and compromise; 31 U.S.C. 3720A, Reduction of tax refund by amount of debt; 5 U.S.C. 5514, Installment deduction for indebtedness to the United States; 31 U.S.C. 3716, Administrative offset; 15 U.S.C. 634(b)(6), Small Business Act.

SOURCE: 60 FR 62191, Dec. 5, 1995, unless otherwise noted.

§ 140.1 What does this part cover?

This part establishes procedures which SBA may use in the collection, through offset, of past-due debts owed to the Government. SBA's failure to comply with any provision of the regulations in this part is not available to any debtor as a defense against collection of the debt through judicial process.

§ 140.2 What is a debt and how can the SBA collect it through offset?

(a) A debt means an amount owed to the United States from loans made or guaranteed by the United States, and from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, forfeitures, or any other source. You are a debtor if you owe an amount to the United States from any of these sources.

(b) SBA may collect past-due debts through offset by using any of three procedures: administrative offset, salary offset, or IRS tax refund offset. A past-due debt is one which has been reduced to judgment, has been accelerated, or has been due for at least 90 days.

(1) *Administrative offset.* SBA may withhold money it owes to the debtor in order to satisfy the debt. This procedure is an "administrative offset" and is authorized by 31 U.S.C. 3716.

(2) *Salary offset.* If the debtor is a federal employee (a civilian employee as defined by 5 U.S.C. 2105, an employee of the U.S. Postal Service or Postal Rate Commission, or a member of the Uniformed Services or Reserve of the Uniformed Services), SBA may deduct payments owed to SBA or another federal agency from the debtor's paycheck. This procedure is a "salary offset" and is authorized by 5 U.S.C. 5514.

(i) Any amount deducted from salary in any one pay period will not exceed 15 percent of a debtor's disposable pay, unless the debtor agrees in writing to a greater percentage.

(ii) SBA also may collect against travel advances, training expenses, disallowed payments, retirement benefits, or any other amount due the employee, including lump-sum payments.

(iii) If an employee has terminated employment after salary offset has

been initiated, there are no limitations on the amount that can be withheld or offset.

(3) *IRS tax refund offset.* SBA may request that IRS reduce a debtor's tax refund by the amount of the debt, as authorized by 31 U.S.C. 3720A. Where available, administrative and salary offsets must be used before collection is attempted through income tax offset. SBA may refer a debt to the IRS for a tax refund offset and take additional action against the debtor to collect the debt at the same time or in sequence. When SBA makes simultaneous or sequential referrals (within six months of the initial notice), only one review pursuant to the rules in this part and the statutes authorizing them is required.

§ 140.3 What rights do you have when SBA tries to collect a debt from you through offset?

(a) SBA must write to you and tell you that it proposes to collect the debt by reducing your federal paycheck, withholding money the Government owes you, and/or reducing your tax refund.

(b) In its written notice to you, SBA must tell you the nature and amount of the debt; that SBA will begin procedures to collect the debt through reduction of your federal paycheck, administrative offset, or reduction of your tax refund; that you have an opportunity to inspect and copy Government records relating to the debt at your expense; and that, before collection begins, you have an opportunity to agree with SBA on a schedule for repayment of your debt.

(c) SBA also must tell you that unless you respond within 60 days from the date of the notice, it will disclose to consumer reporting agencies (also known as credit bureaus or credit agencies) that you are responsible for the debt and the specific information it intends to disclose in order to establish your identity. The amount, status, history of the debt, and agency program under which it arose also will be disclosed.

(d) If you respond to SBA within 60 days from the date of the notice, SBA will not disclose the information to consumer reporting agencies until it

considers your response and determines that you owe a past-due, legally enforceable debt.

(e) Within 60 days of the notice you may present evidence that all or part of the debt is not past due or not legally enforceable.

(1) Where a salary offset or administrative offset is proposed, you will have the opportunity to present your evidence to SBA's Office of Hearings and Appeals ("OHA"). The rules in part 134 of this title govern the procedural rights to which you are entitled. In order to have a hearing before OHA, you must request a hearing within 15 days of receipt of the written notice described in this section. An OHA judge will issue a decision within 60 days of the date you filed your petition/request for a review or hearing with OHA, unless you were granted additional time within which to file your request for review.

(2) Where an income tax refund offset is proposed, you will have the opportunity to request a review and present your evidence to the appropriate SBA Commercial Loan Servicing Center at the address provided in the notice.

(f) SBA must consider any evidence you present and must first decide that a debt is past due and legally enforceable. A debt is legally enforceable if there is any forum, including a State or Federal Court or administrative agency, in which SBA's claim would not be barred on the date of offset. Non-judgment debts are enforceable for ten years; judgment debts are enforceable beyond ten years. You will be notified of SBA's decision at least 30 days before any offset deduction is made. You also will be notified of the amount, frequency, proposed beginning date, and duration of the deductions, as well as any obligation to pay interest, penalties, and administrative costs.

(g) If there is any substantial change in the status or amount of your debt, SBA will promptly report that change to each consumer reporting agency it originally contacted.

(h) SBA will obtain satisfactory assurances from each consumer reporting agency that the consumer reporting agency has complied with all federal laws relating to provision of consumer credit information.

(i) If your debt is being repaid by reduction of your income tax refund and you make any additional payments to SBA, SBA will notify the IRS of these payments and your new balance within 10 business days of receiving your payment.

(j) When the debt of a federal employee is reduced to court judgment, the employee is not entitled to further review by SBA, but is only entitled to notice of a proposed salary offset resulting from the judgment. The amount deducted may not exceed 15% of disposable pay, except when the deduction of a greater amount is necessary to completely collect the debt within the employee's remaining period of employment.

(k) When another federal agency asks SBA to offset a debt for it, SBA will not initiate the requested offset until it has received from the creditor agency a written certification that the debtor owes a debt, its amount, and that the provisions of all applicable statutes and regulations have been complied with fully.

(l) SBA may make an offset prior to completion of the procedures described in this part, if:

(1) Failure to make an offset would substantially prejudice the government's ability to collect the debt; and

(2) The time before the payment would otherwise be made to you does not reasonably permit the completion of the procedures.

(3) Such prior offset then must be followed by the completion of the procedures described in this part.

(m) Where an IRS tax refund offset is sought, SBA must follow the Department of the Treasury's regulations governing offset of a past-due, legally enforceable debt against tax overpayment.

PART 142—PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS

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AUTHORITY: 15 U.S.C. 634(b); 31 U.S.C. 3803(g)(2).

SOURCE: 61 FR 2691, Jan. 29, 1996, unless otherwise noted.

OVERVIEW AND DEFINITIONS

§ 142.1 Overview of regulations.

(a) *Statutory basis.* This part implements the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812 (“the Act”). The Act provides SBA and other federal agencies with an administrative remedy to impose civil penalties and assessments against persons making false claims and statements. The Act also provides due process protections to all persons who are subject to administrative proceedings under this part.

(b) *Possible remedies for program fraud.* In addition to any other penalty which may be prescribed by law, a person who submits, or causes to be submitted, a false claim or a false statement to SBA is subject to a civil penalty of not more than \$5,000 for each statement or claim, regardless of whether property, services, or money is actually delivered or paid by SBA. If SBA has made any payment, transferred property, or provided services in reliance on a false claim, the person submitting it is also subject to an assessment of not more than twice the amount of the false claim. This assessment is in lieu of damages sustained by SBA because of the false claim.

§ 142.2 What kind of conduct will result in program fraud enforcement?

(a) Any person who makes, or causes to be made, a false, fictitious, or fraudulent claim or written statement to SBA is subject to program fraud enforcement. A “person” means any individual, partnership, corporation, association, or other legal entity.

(b) If more than one person makes a false claim or statement, each person

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is liable for a civil penalty. If more than one person makes a false claim which has induced SBA to make payment, an assessment is imposed against each person. The liability of each such person to pay the assessment is joint and several, that is, each is responsible for the entire amount.

(c) No proof of specific intent to defraud is required to establish liability under this part.

§ 142.3 What is a claim?

(a) Claim means any request, demand, or submission:

(1) Made to SBA for property, services, or money;

(2) Made to a recipient of property, services, or money from SBA or to a party to a contract with SBA for property or services, or for the payment of money. This provision applies only when the claim is related to the property, services or money from SBA or to the contract with SBA; or

(3) Made to SBA which decreases an obligation to pay or account for property, services, or money.

(b) A claim can relate to grants, loans, insurance, or other benefits, and includes SBA guaranteed loans made by participating lenders. A claim is made when it is received by SBA, an agent, fiscal intermediary, or other entity acting for SBA, or when it is received by the recipient of property, services, or money, or the party to the contract.

(c) Each voucher, invoice, claim form, or individual request or demand for property, services, or money constitutes a separate claim.

§ 142.4 What is a statement?

A "statement" means any written representation, certification, affirmation, document, record, or accounting or bookkeeping entry made with respect to a claim or with respect to a contract, bid or proposal for a contract, grant, loan or other benefit from SBA. "From SBA" means that SBA provides some portion of the money or property in connection with the contract, bid, grant, loan, or benefit, or is potentially liable to another party for some portion of the money or property under such contract, bid, grant, loan, or benefit. A statement is made, pre-

sented, or submitted to SBA when it is received by SBA or an agent, fiscal intermediary, or other entity acting for SBA.

§ 142.5 What is a false claim or statement?

(a) A claim submitted to SBA is a "false" claim if the person making the claim, or causing the claim to be made, knows or has reason to know that the claim:

(1) Is false, fictitious or fraudulent;

(2) Includes or is supported by a written statement which asserts or contains a material fact which is false, fictitious, or fraudulent;

(3) Includes or is supported by a written statement which is false, fictitious or fraudulent because it omits a material fact that the person making the statement has a duty to include in the statement; or

(4) Is for payment for the provision of property or services which the person has not provided as claimed.

(b) A statement submitted to SBA is a false statement if the person making the statement, or causing the statement to be made, knows or has reason to know that the statement:

(1) Asserts a material fact which is false, fictitious, or fraudulent; or

(2) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in the statement. In addition, the statement must contain or be accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

§ 142.6 What does the phrase "know or have reason to know" mean?

A person knows or has reason to know (that a claim or statement is false) if the person:

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent; or

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

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§ 142.7 Who investigates program fraud?

The Inspector General, or his designee, is responsible for investigating allegations that a false claim or statement has been made. In this regard, the Inspector General has authority under the Program Fraud Civil Remedies Act and the Inspector General Act of 1978 (5 U.S.C. App. 3), as amended, to issue administrative subpoenas for the production of records and documents. The methods for serving a subpoena are set forth in part 101 of this chapter.

§ 142.8 What happens if program fraud is suspected?

(a) If the investigating official concludes that an action under this part is warranted, the investigating official submits a report containing the findings and conclusions of the investigation to a reviewing official. The reviewing official is the General Counsel or his designee. If the reviewing official determines that the report provides adequate evidence that a person submitted a false claim or statement, the reviewing official transmits to the Attorney General written notice of an intention to refer the matter for adjudication, with a request for approval of such referral. This notice will include the reviewing official's statements concerning:

- (1) The reasons for the referral;
 - (2) The claims or statements upon which liability would be based;
 - (3) The evidence that supports liability;
 - (4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in the false claim or statement;
 - (5) Any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and
 - (6) The likelihood of collecting the proposed penalties and assessments.
- (b) If at any time, the Attorney General or designee requests in writing

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that this administrative process be stayed, the Administrator must stay the process immediately. The Administrator may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 142.9 When will SBA issue a complaint?

SBA will issue a complaint:

- (a) If the Attorney General (or designee) approves the referral of the allegations for adjudication; and
- (b) In a case of submission of false claims, if the amount of money or the value of property or services demanded or requested in a false claim, or a group of related claims submitted at the same time, does not exceed \$150,000. A group of related claims submitted at the same time includes only those claims arising from the same transaction (such as a grant, loan, application, or contract) which are submitted together as part of a single request, demand, or submission.

§ 142.10 What is contained in a complaint?

(a) A complaint is a written statement giving notice to the person alleged to be liable under 31 U.S.C. 3802 of the specific allegations being referred for adjudication and of the person's right to request a hearing with respect to those allegations. The person alleged to have made false statements or to have submitted false claims to SBA is referred to as the "defendant."

(b) The reviewing official may join in a single complaint false claims or statements that are unrelated or were not submitted simultaneously, regardless of the amount of money or the value of property or services demanded or requested.

(c) The complaint will state that SBA seeks to impose civil penalties, assessments, or both, against each defendant and will include:

- (1) The allegations of liability against each defendant, including the statutory basis for liability, identification of the claims or statements involved, and the reasons liability allegedly arises from such claims or statements;

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(2) The maximum amount of penalties and assessments for which each defendant may be held liable;

(3) A statement that each defendant may request a hearing by filing an answer and may be represented by a representative;

(4) Instructions for filing such an answer;

(5) A warning that failure to file an answer within 30 days of service of the complaint will result in imposition of the maximum amount of penalties and assessments.

(d) The reviewing official must serve any complaint on the defendant and provide a copy to the Office of Hearings and Appeals (OHA). If a hearing is requested, an Administrative Law Judge (ALJ) from OHA will serve as the Presiding Officer.

§ 142.11 How will the complaint be served?

(a) The complaint must be served on individual defendants directly, a partnership through a general partner, and on corporations or on unincorporated associations through an executive officer or a director, except that service also may be made on any person authorized by appointment or by law to receive process for the defendant.

(b) The complaint may be served either by:

(1) Registered or certified mail (return receipt requested) addressed to the defendant at his or her residence, usual dwelling place, principal office or place of business; or by

(2) Personal delivery by anyone 18 years of age or older.

(c) The date of service is the date of personal delivery or, in the case of service by registered or certified mail, the date of postmark.

(d) Proof of service—

(1) When service is made by registered or certified mail, the return postal receipt will serve as proof of service.

(2) When service is made by personal delivery, an affidavit of the individual serving the complaint, or written acknowledgment of receipt by the defendant or a representative, will serve as proof of service.

(e) When served with the complaint, the defendant also should be served

with a copy of this part 142 and 31 U.S.C. 3801-3812.

PROCEDURES FOLLOWING SERVICE OF A COMPLAINT

§ 142.12 How does a defendant respond to the complaint?

(a) A defendant may file an answer with the reviewing official and the Office of Hearings and Appeals within 30 days of service of the complaint. An answer will be considered a request for an oral hearing.

(b) In the answer, a defendant—

(1) Must admit or deny each of the allegations of liability contained in the complaint (a failure to deny an allegation is considered an admission);

(2) Must state any defense on which the defendant intends to rely;

(3) May state any reasons why he or she believes the penalties, assessments, or both should be less than the statutory maximum; and

(4) Must state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer which meets the requirements set forth in paragraph (b) of this section, the defendant may file with the reviewing official a general answer denying liability, requesting a hearing, and requesting an extension of time in which to file a complete answer. A general answer must be filed within 30 days of service of the complaint.

(d) If the defendant initially files a general answer requesting an extension of time, the reviewing official must promptly file with the ALJ the complaint, the general answer, and the request for an extension of time.

(e) For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section. Such answer must be filed with OHA and a copy must be served on the reviewing official.

§ 142.13 What happens if a defendant fails to file an answer?

(a) If a defendant does not file an answer within 30 days after service of

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the complaint, the reviewing official will refer the complaint to the ALJ.

(b) Once the complaint is referred, the ALJ will promptly serve on the defendant a notice that an initial decision will be issued.

(c) The ALJ will assume the facts alleged in the complaint to be true and, if such facts establish liability under the statute, the ALJ will issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, when a defendant fails to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed in the initial decision.

(e) The initial decision becomes final 30 days after it is issued.

(f) If, at any time before an initial decision becomes final, a defendant files a motion with the ALJ asking that the case be reopened and describing the extraordinary circumstances that prevented the defendant from filing an answer, the initial decision will be stayed until the ALJ makes a decision on the motion. The reviewing official may respond to the motion.

(g) If, in his motion to reopen, a defendant demonstrates extraordinary circumstances excusing his failure to file a timely answer, the ALJ will withdraw the initial decision, and grant the defendant an opportunity to answer the complaint.

(h) A decision by the ALJ to deny a defendant's motion to reopen a case is not subject to review or reconsideration.

§ 142.14 What happens once an answer is filed?

(a) When the reviewing official receives an answer, he must file concurrently, the complaint and the answer with the ALJ, along with a designation of an SBA representative.

(b) When the ALJ receives the complaint and the answer, the ALJ will promptly serve a notice of oral hearing upon the defendant and the representative for SBA, in the same manner as the complaint, service of which is described in §142.11. The notice of oral hearing must be served within six

years of the date on which the claim or statement is made.

(c) The notice must include:

(1) The tentative time, place and nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the defendant's representative and the representative for SBA; and

(6) Such other matters as the ALJ deems appropriate.

HEARING PROVISIONS

§ 142.15 What kind of hearing is contemplated?

The hearing is a formal proceeding conducted by the ALJ during which a defendant will have the opportunity to cross-examine witnesses, present testimony, and dispute liability.

§ 142.16 At the hearing, what rights do the parties have?

(a) The parties to the hearing shall be the defendant and SBA. Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff in an action under the False Claims Act may participate in the hearing to the extent authorized by the provisions of that Act.

(b) Each party has the right to:

(1) Be represented by a representative;

(2) Request a pre-hearing conference and participate in any conference held by the ALJ;

(3) Conduct discovery;

(4) Agree to stipulations of fact or law which will be made a part of the record;

(5) Present evidence relevant to the issues at the hearing;

(6) Present and cross-examine witnesses;

(7) Present arguments at the hearing as permitted by the ALJ; and

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing, as permitted by the ALJ.

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§ 142.17 What is the role of the ALJ?

An ALJ from OHA serves as the Presiding Officer at all hearings, with authority as set forth in § 134.218(b) of this chapter.

§ 142.18 Can the reviewing official or ALJ be disqualified?

(a) A reviewing official or an ALJ may disqualify himself or herself at any time.

(b) Upon motion of any party, the reviewing official or ALJ may be disqualified as follows:

(1) The motion must be supported by an affidavit containing specific facts establishing that personal bias or other reason for disqualification exists, including the time and circumstances of the discovery of such facts;

(2) The motion must be filed promptly after discovery of the grounds for disqualification, or the objection will be deemed waived; and

(3) The party, or representative of record, must certify in writing that the motion is made in good faith.

(c) Once a motion has been filed to disqualify the reviewing official, the ALJ will halt the proceedings until resolving the matter of disqualification. If the ALJ determines that the reviewing official is disqualified, the ALJ will dismiss the complaint without prejudice. If the ALJ disqualifies himself or herself, the case will be promptly reassigned to another ALJ.

§ 142.19 How are issues brought to the attention of the ALJ?

All applications to the ALJ for an order or ruling are made by motion, stating the relief sought, the authority relied upon, and the facts alleged. Procedures for filing motions under this section are governed by § 134.211 of this chapter.

§ 142.20 How are papers served?

Except for service of a complaint or a notice of hearing under §§ 142.11 and 142.14(b) respectively, service of papers must be made as prescribed by § 134.204 of this chapter.

§ 142.21 How will the hearing be conducted and who has the burden of proof?

(a) The ALJ conducts a hearing in order to determine whether a defendant is liable for a civil penalty, assessment, or both and, if so, the appropriate amount of the civil penalty and/or assessment. The hearing will be recorded and transcribed, and the transcript of testimony, exhibits admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for a decision by the ALJ.

(b) SBA must prove a defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) A defendant must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 142.22 How is evidence presented at the hearing?

(a) Witnesses at the hearing must testify orally under oath or affirmation unless otherwise ordered by the ALJ. At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition, a copy of which must be provided to all other parties, along with the last known address of the witness, in a manner which allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing.

(b) The ALJ determines the admissibility of evidence in accordance with § 134.223 (a) and (b) of this chapter.

§ 142.23 Are there limits on disclosure of documents or discovery?

(a) Upon written request to the reviewing official, the defendant may review all non-privileged, relevant and material documents, records and other material related to the allegations contained in the complaint. After paying SBA a reasonable fee for duplication, the defendant may obtain a copy of the records described.

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(b) Upon written request to the reviewing official, the defendant may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint. If the document would otherwise be privileged, only the portion of the document containing exculpatory information must be disclosed. As used in this section, the term "information" does not include legal materials such as statutes or case law obtained through legal research.

(c) The notice sent to the Attorney General from the reviewing official is not discoverable under any circumstances.

(d) Other discovery is available only as ordered by the ALJ and includes only those methods of discovery allowed by § 134.213 of this chapter.

§ 142.24 Can witnesses be subpoenaed?

A party seeking the appearance and testimony of any individual or the production of documents or records at a hearing may request in writing that the ALJ issue a subpoena. Any such request must be filed with the ALJ not less than 15 days before the scheduled hearing date unless otherwise allowed by the ALJ for good cause. A subpoena shall be issued by the ALJ in the manner specified by § 134.214 of this chapter.

§ 142.25 Can a party or witness object to discovery?

Any party or prospective witness may file a motion to quash a subpoena or to limit discovery or the disclosure of evidence. Motions to limit discovery or to object to the disclosure of evidence are governed by § 134.213 of this chapter. Motions to limit or quash subpoenas are governed by § 134.214(d) of this chapter.

§ 142.26 Can a party informally discuss the case with the ALJ?

No. Such discussions are forbidden as ex parte communications with the ALJ as set forth in § 134.220 of this chapter. This does not prohibit a party from communicating with other employees of OHA to inquire about the status of a case or to ask routine questions concerning administrative functions and procedures.

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§ 142.27 Are there sanctions for misconduct?

The ALJ may sanction a party or representative, as set forth in § 134.219 of this chapter.

§ 142.28 Where is the hearing held?

The ALJ will hold the hearing in any judicial district of the United States:

(a) In which the defendant resides or transacts business; or

(b) In which the claim or statement on which liability is based was made, presented or submitted to SBA; or

(c) As agreed upon by the defendant and the ALJ.

§ 142.29 Are witness lists exchanged before the hearing?

(a) At least 15 days before the hearing or at such other time as ordered by the ALJ, the parties must exchange witness lists and copies of proposed hearing exhibits, including copies of any written statements or transcripts of deposition testimony that the party intends to offer in lieu of live testimony.

(b) If a party objects, the ALJ will not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to an opposing party unless the ALJ finds good cause for the omission or concludes that there is no prejudice to the objecting party.

(c) Unless a party objects within the time set by the ALJ, documents exchanged in accordance with this section are deemed to be authentic for the purpose of admissibility at the hearing.

DECISIONS AND APPEALS

§ 142.30 How is the case decided?

(a) The ALJ will issue an initial decision based only on the record. It will contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The ALJ will serve the initial decision on all parties within 90 days after close of the hearing or expiration of any allowed time for submission of post-hearing briefs. If the ALJ fails to meet this deadline, he or she shall

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promptly notify the parties of the reason for the delay and set a new deadline.

(c) The findings of fact must include a finding on each of the following issues:

(1) Whether any one or more of the claims or statements identified in the complaint violate this part; and

(2) If the defendant is liable for penalties or assessments, the appropriate amount of any such penalties or assessments, considering any mitigating or aggravating factors.

(d) The initial decision will include a description of the right of a defendant found liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Administrator.

§ 142.31 Can a party request reconsideration of the initial decision?

(a) Any party may file a motion for reconsideration of the initial decision with the ALJ within 20 days of receipt of the initial decision. If the initial decision was served by mail, there is a rebuttable presumption that the initial decision was received by the party 5 days from the date of mailing.

(b) A motion for reconsideration must be accompanied by a supporting brief and must describe specifically each allegedly erroneous decision.

(c) Any response to a motion for reconsideration must be filed within 20 days of receipt of such motion.

(d) The ALJ will dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(e) If the ALJ issues a revised initial decision upon motion of a party, that party may not file another motion for reconsideration.

§ 142.32 When does the initial decision of the ALJ become final?

(a) The initial decision of the ALJ becomes the final decision of SBA, and shall be binding on all parties 30 days after it is issued, unless any party timely files a motion for reconsideration or any defendant adjudged to have submitted a false claim or statement timely appeals to the SBA Administrator, as set forth in § 142.33.

(b) If the ALJ disposes of a motion for reconsideration by denying it or by

issuing a revised initial decision, the ALJ's order on the motion for reconsideration becomes the final decision of SBA 30 days after the order is issued, unless a defendant adjudged to have submitted a false claim or statement timely appeals to the Administrator, within 30 days of the ALJ's order, as set forth in § 142.33.

§ 142.33 What are the procedures for appealing the ALJ decision?

(a) Any defendant who submits a timely answer and is found liable for a civil penalty or assessment in an initial decision may appeal the decision.

(b) The defendant may file a notice of appeal with the Administrator within 30 days following issuance of the initial decision, serving a copy of the notice of appeal on all parties and the ALJ. The Administrator may extend this deadline for up to thirty additional days if an extension request is filed within the initial 30 day period and shows good cause.

(c) The defendant's appeal will not be considered until all timely motions for reconsideration have been resolved.

(d) If a timely motion for reconsideration is denied, a notice of appeal may be filed within 30 days following such denial or issuance of a revised initial decision, whichever applies.

(e) A notice of appeal must be supported by a written brief specifying why the initial decision should be reversed or modified.

(f) SBA's representative may file a brief in opposition to the notice of appeal within 30 days of receiving the defendant's notice of appeal and supporting brief.

(g) If a defendant timely files a notice of appeal, and the time for filing motions for reconsideration has expired, the ALJ will forward the record of the proceeding to the Administrator.

§ 142.34 Are there any limitations on the right to appeal to the Administrator?

(a) A defendant has no right to appear personally, or through a representative, before the Administrator.

(b) There is no right to appeal any interlocutory ruling.

(c) The Administrator will not consider any objection or evidence that

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was not raised before the ALJ unless the defendant demonstrates that the failure to object was caused by extraordinary circumstances. If the appealing defendant demonstrates to the satisfaction of the Administrator that extraordinary circumstances prevented the presentation of evidence at the hearing, and that the additional evidence is material, the Administrator may remand the matter to the ALJ for consideration of the additional evidence.

§ 142.35 How does the Administrator dispose of an appeal?

(a) The Administrator may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment imposed by the ALJ in the initial decision or reconsideration decision.

(b) The Administrator will promptly serve each party to the appeal and the ALJ with a copy of his or her decision. This decision must contain a statement describing the right of any person, against whom a penalty or assessment has been made, to seek judicial review.

§ 142.36 Can I obtain judicial review?

If the initial decision is appealed, the decision of the Administrator is the final decision of SBA and is not subject to judicial review unless the defendant files a petition for judicial review within 60 days after the Administrator serves the defendant with a copy of the final decision.

§ 142.37 What judicial review is available?

31 U.S.C. 3805 authorizes judicial review by the appropriate United States District Court of any final SBA decision imposing penalties or assessments, and specifies the procedures for such review. To obtain judicial review, a defendant must file a petition in a timely fashion.

§ 142.38 Can the administrative complaint be settled voluntarily?

(a) Parties may make offers of compromise or settlement at any time. Any compromise or settlement must be in writing.

(b) The reviewing official has the exclusive authority to compromise or settle the case from the date on which

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the reviewing official is permitted to issue a complaint until the ALJ issues an initial decision.

(c) The Administrator has exclusive authority to compromise or settle the case from the date of the ALJ's initial decision until initiation of any judicial review or any action to collect the penalties and assessments.

(d) The Attorney General has exclusive authority to compromise or settle the case while any judicial review or any action to recover penalties and assessments is pending.

(e) The investigating official may recommend settlement terms to the reviewing official, the Administrator, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Administrator or the Attorney General, as appropriate.

§ 142.39 How are civil penalties and assessments collected?

31 U.S.C. 3806 and 3808(b) authorize the Attorney General to bring specific actions for collection of such civil penalties and assessments including administrative offset under 31 U.S.C. 3716. The penalties and assessments may not, however, be administratively offset against an overpayment of federal taxes (then or later owed) to the defendant by the United States.

§ 142.40 What if the investigation indicates criminal misconduct?

(a) Any investigating official may:

(1) Refer allegations of criminal misconduct directly to the Department of Justice for prosecution or for suit under the False Claims Act or other civil proceeding;

(2) Defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution; or

(3) Issue subpoenas under other statutory authority.

(b) Nothing in this part limits the requirement that SBA employees report suspected violations of criminal law to the SBA Office of Inspector General or to the Attorney General.

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§ 142.41 How does SBA protect the rights of defendants?

These procedures separate the functions of the investigating official, reviewing official, and the ALJ, each of whom report to a separate organizational authority in accordance with 31 U.S.C. 3801. Except for purposes of settlement, or as a witness or a representative in public proceedings, no investigating official, reviewing official, or SBA employee or agent who helps investigate, prepare, or present a case may (in such case, or a factually related case) participate in the initial decision or the review of the initial decision by the Administrator. This separation of functions and organization is designed to assure the independence and impartiality of each government official during every stage of the proceeding. The representative for SBA may be employed in the offices of either the investigating official or the reviewing official.

PART 143—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

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Subpart E—Entitlements [Reserved]

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Subpart A—General

§ 143.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 143.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§ 143.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors,

subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a

procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For non-construction grants, the SF-269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

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Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the

work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *grant* in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than *equipment* as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations

implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. *Termination* does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimation of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 143.4 Applicability.

(a) *General.* Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or

with regulations authorized in accordance with the exception provision of § 143.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I–III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)(19)(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI–AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

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(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in §143.4(a)(3) through (8) are subject to subpart E.

§ 143.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in §143.6.

§ 143.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administra-

tive requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

Subpart B—Pre-Award Requirements

§ 143.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 143.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, “Intergovernmental Review of Federal Programs,” States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 143.12 Special grant or subgrant conditions for “high-risk” grantees.

(a) A grantee or subgrantee may be considered *high risk* if an awarding

agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 143.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with

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State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed

in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 143.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds

and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute,

awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 143.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 *et seq.*) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to \$100 per year for administrative expenses.

§ 143.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

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(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

| For the costs of a— | Use the principles in— |
|--|--|
| State, local or Indian tribal government. | OMB Circular A–87. |
| Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular. | OMB Circular A–122. |
| Educational institutions. | OMB Circular A–21. |
| For-profit organization other than a hospital and an organization named in OMB Circular A–122 as not subject to that circular. | 48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency. |

§ 143.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

§ 143.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions—*(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 143.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 143.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts

earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those

sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services—(1) Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2)(i) and (ii) of this section apply:

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(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in §143.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that

the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 143.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. *During the grant period* is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See §143.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 143.31 and 143.32.

(g) *Use of program income.* Program income shall be deducted from outlays

which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 143.26 Non-Federal audit.

(a) *Basic Rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organi-

zations." The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends \$300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Administrative Requirements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractors has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 143.36 shall be followed.

[53 FR 8048, 8087, Mar. 11, 1988, as amended at 62 FR 45939, 45940, Aug. 29, 1997]

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CHANGES, PROPERTY, AND SUBAWARDS

§ 143.30 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 143.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes—(1) Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a non-construction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds \$100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and non-construction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from non-

construction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 143.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget format the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 143.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved

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project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§ 143.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 143.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in §143.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee

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may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of \$5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying

the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow §143.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 143.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are

not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 143.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

- (a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and
- (b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 143.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

§ 143.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms,

conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- (i) The employee, officer or agent,
- (ii) Any member of his immediate family,
- (iii) His or her partner, or
- (iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements

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for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee un-

less the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 143.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a *brand name* product instead of allowing an *equal* product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except

in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a *brand name or equal* description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed.* (1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing

services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at \$100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 143.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such

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discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2)(i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §143.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make avail-

able, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "brand name" product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system

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to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must con-

tain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a-7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of \$2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2000, and in excess of \$2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining

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to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

[53 FR 8048, 8087, Mar. 11, 1988, as amended at 60 FR 19639, 19642, Apr. 19, 1995]

§ 143.37 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 143.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 143.10;

(2) Section 143.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 143.21; and

(4) Section 143.50.

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

§ 143.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require

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the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 143.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in

connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form*. Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all non-construction grants and for construction grants when required in accordance with § 143.41(e)(2)(iii) of this section.

(2) *Accounting basis*. Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency*. The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date*. When reports are required on a quarterly or semiannual

basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form*. (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements*. Forecasts of Federal cash requirements may be required in the *Remarks* section of the report.

(3) *Cash in hands of subgrantees*. When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date*. Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments*. Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit,

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electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 143.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 143.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 143.41(b)(3).

(2) Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.

(i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 143.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 143.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 143.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construc-

tion Programs shall be governed by § 143.41(b)(2).

§ 143.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 143.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period—*(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single

or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records. Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§ 143.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee

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an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 143.35).

§ 143.44 Termination for convenience.

Except as provided in § 143.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of

the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 143.43 or paragraph (a) of this section.

Subpart D—After-the-Grant Requirements

§ 143.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable).*

(3) *Final request for payment (SF-270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:*

In accordance with § 143.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

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§ 143.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 143.42;

(d) Property management requirements in §§ 143.31 and 143.32; and

(e) Audit requirements in § 143.26.

§ 143.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Entitlements [Reserved]

PART 145—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

Subpart A—General

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145.630 Certification requirements and procedures.

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APPENDIX A TO PART 145—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

APPENDIX B TO PART 145—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

APPENDIX C TO PART 145—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

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AUTHORITY: E.O. 12549; Secs. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.); 15 U.S.C. 634(b)(6).

CROSS REFERENCE: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990, and 60 FR 33036, June 26, 1995.

SOURCE: 53 FR 19176, 19204, May 26, 1988, unless otherwise noted.

EDITORIAL NOTE: For additional information, see related documents published at 52 FR 20360, May 29, 1987, 53 FR 19160, May 26, 1988, and 53 FR 34474, Sept. 6, 1988.

Subpart A—General

§ 145.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and non-financial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of E.O. 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the E.O. by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of “ineligible” in §145.105), and participants who have voluntarily excluded themselves from participation in covered transactions;

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) These regulations also implement Executive Order 12689 (3 CFR, 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Public Law 103-355, sec. 2455, 108 Stat. 3327) by—

(1) Providing for the inclusion in the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* all persons proposed for debarment, debarred or suspended under the Federal Acquisition Regulation, 48 CFR part 9, subpart 9.4; persons against which governmentwide exclusions have been entered under this part; and persons determined to be ineligible; and

(2) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion.

(d) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

[60 FR 33040, 33044, June 26, 1995]

§ 145.105 Definitions.

The following definitions apply to this part:

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

Agency. Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

Civil judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation,

or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

Conviction. A judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is *debarred*.

Debarring official. An official authorized to impose debarment. The debarring official is either:

- (1) The agency head, or
- (2) An official designated by the agency head.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

List of Parties Excluded from Federal Procurement and Nonprocurement Programs. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under

Executive Orders 12549 and 12689 and these regulations or 48 CFR part 9, subpart 9.4, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, and those persons who have been determined to be ineligible.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Principal. Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

- (1) Principal investigators.
- (2) Securities brokers and dealers under the section 7(a) Loan, Certified Development Company (CDC) and

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Small Business Investment Company (SBIC) Programs.

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

State. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

Suspending official. An official authorized to impose suspension. The suspending official is either:

- (1) The agency head, or
- (2) An official designated by the agency head.

Suspension. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is *suspended*.

Voluntary exclusion or voluntarily excluded. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

SBA. The Small Business Administration.

[53 FR 19176, 19204, May 26, 1988, as amended at 53 FR 19176, May 26, 1988; 60 FR 33041, 33044, June 26, 1995]

§ 145.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement

programs. For purposes of these regulations such transactions will be referred to as *covered transactions*.

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently \$25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

- (1) Principal investigators.
- (2) Providers of federally-required audit services.
- (3) Securities brokers and dealers under the section 7(a) Loan, Certified Development Company (CDC), and

Small Business Investment Company (SBIC) Programs.

(4) Applicant representatives under the section 7(a) Loan, Certified Development Company (CDC), Small Business Investment Company (SBIC), Small Business Development Center (SBDC) and section 7(j) Programs.

(5) Providers of professional services under the section 7(a) Loan, Certified Development Center (CDC), Small Business Investment Company (SBIC), Small Business Development Center (SBDC), and section 7(j) Programs.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtler awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," § 145.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 145.110(a). Sections 145.325, "Scope of debarment," and 145.420, "Scope of suspension," govern

the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* In accordance with E.O. 12689 and section 2455 of Public Law 103-355, any debarment, suspension, proposed debarment or other governmentwide exclusion initiated under the Federal Acquisition Regulation (FAR) on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension or other governmentwide exclusion initiated under this regulation on or after August 25, 1995 shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

[53 FR 19176, 19204, May 26, 1988, as amended at 53 FR 19176, May 26, 1988; 60 FR 33041, 33044, June 26, 1995]

§ 145.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

Subpart B—Effect of Action**§ 145.200 Debarment or suspension.**

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to § 145.215.

(b) *Lower tier covered transactions.* Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see § 145.110(a)(1)(ii)) for the period of their exclusion.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for—

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

[60 FR 33041, 33044, June 26, 1995]

§ 145.205 Ineligible persons.

Persons who are ineligible, as defined in § 145.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§ 145.210 Voluntary exclusion.

Persons who accept voluntary exclusions under § 145.315 are excluded in accordance with the terms of their settlements. SBA shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 145.215 Exception provision.

SBA may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and § 145.200. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 145.505(a).

[60 FR 33041, 33044, June 26, 1995]

§ 145.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

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(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible or voluntarily excluded, except as provided in § 145.215.

[60 FR 33041, 33044, June 26, 1995]

§ 145.225 Failure to adhere to restrictions.

(a) Except as permitted under § 145.215 or § 145.220, a participant shall not knowingly do business under a covered transaction with a person who is—

- (1) Debarred or suspended;
- (2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or
- (3) Ineligible for or voluntarily excluded from the covered transaction.

(b) Violation of the restriction under paragraph (a) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(c) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction (See Appendix B of these regulations), unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

[60 FR 33041, 33044, June 26, 1995]

Subpart C—Debarment

§ 145.300 General.

The debarring official may debar a person for any of the causes in § 145.305, using procedures established in §§ 145.310 through 145.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

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§ 145.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 145.300 through 145.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 145.215 or § 145.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed

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the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 145.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of subpart F of this part, relating to providing a drug-free workplace, as set forth in § 145.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[53 FR 19176, 19204, May 26, 1988, as amended at 54 FR 4950, 4953, Jan. 31, 1989]

§ 145.310 Procedures.

SBA shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 145.311 through 145.314.

§ 145.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§ 145.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under § 145.305 for proposing debarment;

(d) Of the provisions of §§ 145.311 through 145.314, and any other SBA procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

§ 145.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(3) In accordance with § 145.314(b)(2), the debarring official may refer cases involving disputed material facts to the Office of Hearings and Appeals, which shall conduct any additional proceedings necessary in accordance with the procedures contained in part 134 of this title. Upon conclusion of such proceedings, the Office of Hearings and Appeals shall issue a recommended decision to the debarring official including proposed findings of facts and conclusions of law.

[53 FR 19176, 19204, May 26, 1988, as amended at 53 FR 19176, May 26, 1988]

§ 145.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

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(b) *Additional proceedings necessary.*

(1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(i) The Office of Hearings and Appeals shall conduct any proceedings regarding disputed material facts necessary under this section.

(ii) Any party to the debarment proceeding may file exceptions to the recommended decision with the debarring official in accordance with 13 CFR 134.35.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c)(1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 145.215.

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(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

[53 FR 19176, 19204, May 26, 1988, as amended at 53 FR 19176, May 26, 1988]

§ 145.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, SBA may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see subpart E).

§ 145.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of subpart F of this part (see § 145.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§ 145.311 through 145.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by

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documentation. The debarring official may grant such a request for reasons including, but not limited to:

- (1) Newly discovered material evidence;
- (2) Reversal of the conviction or civil judgment upon which the debarment was based;
- (3) Bona fide change in ownership or management;
- (4) Elimination of other causes for which the debarment was imposed; or
- (5) Other reasons the debarring official deems appropriate.

[53 FR 19176, 19204, May 26, 1988, as amended at 54 FR 4950, 4953, Jan. 31, 1989]

§ 145.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§ 145.311 through 145.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the partici-

pant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Subpart D—Suspension

§ 145.400 General.

(a) The suspending official may suspend a person for any of the causes in § 145.405 using procedures established in §§ 145.410 through 145.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in § 145.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 145.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 145.400 through 145.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 145.305(a); or

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(2) That a cause for debarment under § 145.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 145.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* SBA shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in §§ 145.411 through 145.413.

§ 145.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under § 145.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of §§ 145.411 through 145.413 and any other SBA procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

§ 145.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a rep-

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resentative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(3) In accordance with § 145.413(b)(2), the suspending official may refer cases involving disputed material facts to the Office of Hearings and Appeals, which shall conduct any additional proceedings necessary in accordance with the procedures contained in part 134 of this title. Upon conclusion of such proceedings, the Office of Hearings and Appeals shall issue a recommended decision to the suspending official including proposed findings of facts and conclusions of law.

[53 FR 19176, 19204, May 26, 1988, as amended at 53 FR 19176, May 26, 1988]

§ 145.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 145.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

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(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(i) The Office of Hearings and Appeals shall conduct any proceedings regarding disputed material facts necessary under this section.

(ii) Any party to the suspension proceeding may file exceptions to the recommended decision with the suspending official in accordance with 13 CFR 134.35.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

[53 FR 19176, 19204, May 26, 1988, as amended at 53 FR 19176, May 26, 1988]

§ 145.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official

or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 145.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 145.325), except that the procedures of §§ 145.410 through 145.413 shall be used in imposing a suspension.

Subpart E—Responsibilities of GSA, Agency and Participants

§ 145.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ 145.505 SBA responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which SBA has granted exceptions under §145.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in §145.500(b) and of the exceptions granted under §145.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§ 145.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in appendix A to this part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the cer-

tification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in appendix B to this part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel.).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to SBA if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: 55 FR 21688, 21692, May 25, 1990, unless otherwise noted.

§ 145.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will

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not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 145.605 Definitions.

(a) Except as amended in this section, the definitions of § 145.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All *direct charge* employees;

(ii) All *indirect charge* employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or

independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ 145.610 Coverage.

(a) This subpart applies to any grantee of the agency.

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(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 145.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under § 145.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)–(g) and/or (B) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 145.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 145.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 145.320(a)(2) of this part).

§ 145.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 145.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time

certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ 145.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s)

for each of the Federal agency's affected grants.

(Approved by the Office of Management and Budget under control number 0991-0002)

APPENDIX A TO PART 145—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction*, *debarred*, *suspended*, *ineligible*, *lower tier covered transaction*, *participant*, *person*, *primary covered transaction*, *principal*, *proposal*, and *voluntarily excluded*, as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment

under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them

for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[60 FR 33042, 33044, June 26, 1995]

APPENDIX B TO PART 145—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms *covered transaction*, *debarred*, *suspended*, *ineligible*, *lower tier covered transaction*, *participant*, *person*, *primary covered transaction*, *principal*, *proposal*, and *voluntarily excluded*, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted

for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment,

declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[60 FR 33042, 33044, June 26, 1995]

APPENDIX C TO PART 145—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All *direct charge* employees; (ii) All *indirect charge* employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (GRANTEES OTHER THAN INDIVIDUALS)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a

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condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (GRANTEES WHO ARE INDIVIDUALS)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every

grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[55 FR 21690, 21692, May 25, 1990]

PART 146—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

146.100 Conditions on use of funds.

146.105 Definitions.

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146.400 Penalties.

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APPENDIX A TO PART 146—CERTIFICATION REGARDING LOBBYING

APPENDIX B TO PART 146—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Pub. L. 101-121 (31 U.S.C. 1352); 15 U.S.C. 634(b)(6).

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6737 and 6747, Feb. 26, 1990, unless otherwise noted.

Subpart A—General

§ 146.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a

Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 146.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

- (1) The awarding of any Federal contract;
- (2) The making of any Federal grant;
- (3) The making of any Federal loan;
- (4) The entering into of any cooperative agreement; and,
- (5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included

under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not fur-

nished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 146.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

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(1) Award of a Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding \$100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding \$100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding \$100,000 at any tier under a Federal loan exceeding \$150,000; or,

(4) A contract or subcontract exceeding \$100,000 at any tier under a Federal cooperative agreement,

shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either Subpart B or C.

Subpart B—Activities by Own Employees

§ 146.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 146.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement

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if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 146.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 146.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Fed-

eral contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, *professional and technical services* shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or

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reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 146.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 146.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 146.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 146.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, *professional and technical services* shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer)

or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 146.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than \$10,000 and not

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more than \$100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of \$10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between \$10,000 and \$100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 146.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 146.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 146.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 146.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the

Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 146.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the

report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

**APPENDIX A TO PART 146—
CERTIFICATION REGARDING LOBBYING**

*Certification for Contracts, Grants, Loans, and
Cooperative Agreements*

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

*Statement for Loan Guarantees and Loan
Insurance*

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting

Small Business Administration

Pt. 146, App. A

to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

APPENDIX B TO PART 146—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

Approved by OMB
0348-0046

| | | | | | |
|---|--|---|--|--|--|
| 1. Type of Federal Action: <input type="checkbox"/> a. contract <input type="checkbox"/> b. grant <input type="checkbox"/> c. cooperative agreement <input type="checkbox"/> d. loan <input type="checkbox"/> e. loan guarantee <input type="checkbox"/> f. loan insurance | | 2. Status of Federal Action: <input type="checkbox"/> a. bid/offer/application <input type="checkbox"/> b. initial award <input type="checkbox"/> c. post-award | | 3. Report Type: <input type="checkbox"/> a. initial filing <input type="checkbox"/> b. material change For Material Change Only: year _____ quarter _____ date of last report _____ | |
| 4. Name and Address of Reporting Entity: <input type="checkbox"/> Prime <input type="checkbox"/> Subawardee Tier _____, if known: Congressional District, if known: _____ | | | 5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime: Congressional District, if known: _____ | | |
| 6. Federal Department/Agency: | | | 7. Federal Program Name/Description: CFDA Number, if applicable: _____ | | |
| 8. Federal Action Number, if known: | | | 9. Award Amount, if known: \$ _____ | | |
| 10. a. Name and Address of Lobbying Entity <i>(if individual, last name, first name, MI):</i> | | | b. Individuals Performing Services <i>(including address if different from No. 10a)</i> <i>(last name, first name, MI):</i> | | |
| (attach Continuation Sheet(s) SF-LLL-A, if necessary) | | | | | |
| 11. Amount of Payment <i>(check all that apply):</i> \$ _____ <input type="checkbox"/> actual <input type="checkbox"/> planned | | | 13. Type of Payment <i>(check all that apply):</i> <input type="checkbox"/> a. retainer <input type="checkbox"/> b. one-time fee <input type="checkbox"/> c. commission <input type="checkbox"/> d. contingent fee <input type="checkbox"/> e. deferred <input type="checkbox"/> f. other; specify: _____ | | |
| 12. Form of Payment <i>(check all that apply):</i> <input type="checkbox"/> a. cash <input type="checkbox"/> b. in-kind; specify: nature _____ value _____ | | | | | |
| 14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11: (attach Continuation Sheet(s) SF-LLL-A, if necessary) | | | | | |
| 15. Continuation Sheet(s) SF-LLL-A attached: <input type="checkbox"/> Yes <input type="checkbox"/> No | | | | | |
| 16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure. | | | Signature: _____ Print Name: _____ Title: _____ Telephone No.: _____ Date: _____ | | |
| Federal Use Only: | | | Authorized for Local Reproduction Standard Form - LLL | | |

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefix, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.
(b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

**DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET**

Approved by OMB
0148-0046

Reporting Entity: _____ Page _____ of _____

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Standard Form - ULL-A

CHAPTER III—ECONOMIC DEVELOPMENT ADMINISTRATION, DEPARTMENT OF COMMERCE

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PART 300—GENERAL INFORMATION

Sec.

300.1 Introduction and purpose.

300.2 Definitions.

300.3 OMB control numbers.

300.4 Economic Development Administration—Washington, DC, Regional and Economic Development Representatives.

AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5352, Feb. 3, 1999, unless otherwise noted.

§ 300.1 Introduction and purpose.

(a) *Introduction.* Is your community suffering from severe economic distress (e.g., high unemployment, low income, sudden economic changes, etc.)? Are you a representative of a State or local unit of government, Indian tribe, public or private nonprofit organization, educational institution, or community development corporation looking for grant assistance to enhance your opportunities for economic development? If so, these regulations of the Economic Development Administration (EDA) of the U.S. Department of Commerce may be of help. These regulations tell you the purpose of EDA and outline the program requirements, project selection process, project evaluation criteria, and other relevant matters. The information in these regulations covers grant programs of EDA that provide financial awards for the following:

- Public Works and Development Facilities;
- Planning;
- Research, Evaluation, Training and Technical Assistance;
- Trade Adjustment Assistance; and
- Economic Adjustment Assistance.

(b) What is the Purpose of the Economic Development Administration?

(1) Many communities lag behind and suffer economic distress in one form or another, such as:

- High unemployment;
- Low income;
- Underemployment;
- Outmigration;
- Sudden economic changes due to the restructuring or relocation of industrial firms;
- Closing or realignment of defense bases or cutbacks in defense procurement;

- Economic impact of natural disasters or other emergencies;
- Actions of the Federal government (such as environmental requirements) that curtail or remove economic activities; and
- Impacts of foreign trade.

(2) The purpose of the Economic Development Administration is to address economic problems affecting economically distressed rural and urban communities; by helping them:

(i) Develop and strengthen their economic development planning and institutional capacity to design and implement business outreach and development programs; and

(ii) Develop or expand public works and other facilities, financing tools, and resources that will create new job opportunities, save existing jobs, retain existing businesses, and support the development of new businesses.

(3) To promote a strong and growing economy throughout the United States, EDA works in partnership with State and local governments, Indian tribes and local, regional, and State public and private nonprofit organizations. With them EDA develops and carries out comprehensive economic development strategies that address the economic problems of distressed communities. EDA helps such communities increase their economic development capacities so that they can take advantage of existing resources and development opportunities.

§ 300.2 Definitions.

Unless otherwise defined in other parts or sections of this Chapter, the terms listed are defined as follows:

Comprehensive Economic Development Strategy, CEDS, or strategy means a strategy approved by EDA under § 301.3 of this chapter.

Department means the Department of Commerce.

Economic Development District or district:

(1) Means any area in the United States that has been designated by EDA as an Economic Development District under § 302.1 of these regulations; and

(2) Includes any Economic Development District designated by EDA under sec. 403 of the Public Works and Economic Development Act of 1965, as

amended, as in effect on the day before the effective date of Public Law 105–393.

EDA means the Economic Development Administration in the U.S. Department of Commerce when a place or agency is intended, and refers to the headquarters office in Washington, D.C., or a regional office, as appropriate; or it means the Assistant Secretary of Commerce for Economic Development or his/her designee when a person is intended. The locations of EDA's offices are listed each year in a Notice of Funding Availability (NOFA). The general information telephone number for EDA is (202) 482–2309.

Eligible applicant means:

- (1) In general,—
 - (i) An entity qualified to be an eligible recipient, or
 - (ii) Its authorized representative.
- (2) Except in the case of Research, Evaluation, Training, or Technical Assistance grants under part 307, a private individual or for-profit organization cannot be an eligible applicant.

Eligible recipient means

- (1) In general,—
 - (i) An area described in §301.2 of these regulations;
 - (ii) An Economic Development District;
 - (iii) An Indian tribe or a consortium of Indian tribes;
 - (iv) A State;
 - (v) A city or other political subdivision of a State or a consortium of political subdivisions;
 - (vi) An institution of higher education or a consortium of institutions of higher education; or
 - (vii) A public or private nonprofit organization or association acting in cooperation with officials of a political subdivision of a State.
- (2) In the case of Research, Evaluation, Training, and Technical Assistance grants under part 307, eligible recipient also includes private individuals and for-profit organizations.

Federal agency means a department, agency, or instrumentality of the United States.

Federally-declared disaster means a Presidentially-declared disaster or a Federally-declared disaster pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Public

Law 94–265) as amended by the Sustainable Fisheries Act (Public Law 104–297), or a Federal declaration pursuant to the Consolidated Farm and Rural Development Act, as amended (Public Laws 92–419, 96–438, 97–35, 98–258, 99–198, 100–233, 100–387, and 101–624), or a Federally-declared disaster pursuant to the Small Business Act, as amended (Public Law 85–536).

Financial assistance means grant.

Grant means the non-procurement award of EDA funds to an eligible recipient under PWEDA or the Trade Act, as applicable. The term includes a cooperative agreement, within the meaning of chapter 63 of title 31, United States Code.

Indian tribe means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native Village or Regional Corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The term includes: The governing body of a tribe, nonprofit Indian corporation (restricted to Indians), Indian authority, or other nonprofit tribal organization or entity, provided that the tribal organization or entity is wholly owned by, and established for the benefit of, the tribe or Alaska Native Village.

Local share, matching share or local share match are used interchangeably to mean non-Federal funds or goods and services provided by recipients or third parties that are required as a condition of a grant, and includes funds from other Federal agencies only if there is statutory authority allowing such use.

Notice of Funding Availability or NOFA, refers to the notice or notices EDA publishes each year in the FEDERAL REGISTER and on EDA's internet web site, <http://www.doc.gov/eda>, describing the available amounts, particular procedures, priorities, and special circumstances for the EDA grant programs for that year.

PWEDA means the Public Works and Economic Development Act of 1965, as amended (Pub. L. 89–136, 42 U.S.C. 3121 *et seq.*), including the comprehensive

amendments by the Economic Development Administration Reform Act of 1998 (Pub. L. 105-393). (The term “PWEDA” was used to refer to EDA’s authorizing legislation as it was in effect before the effective date of Public Law 105-393, signed into law on November 13, 1998. In these regulations, the term “PWEDA” refers to the legislation as currently amended by the 1998 law.)

Presidentially-declared disaster means a major disaster or emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*).

Project means the activity or activities the purpose of which fulfills EDA program requirements and that EDA funds in whole or in part.

Proposed District means a geographic entity composed of one or more eligible areas proposed for designation as an Economic Development District.

Recipient and *grantee* are used interchangeably to mean an entity receiving funds from EDA under PWEDA or the Trade Act, as applicable, and includes any EDA approved successor to such recipient.

State means a State, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

The Trade Act means Title II, Chapters 3 and 5, of the Trade Act of 1974, as amended (19 U.S.C. 2341, *et seq.*).

United States means all of the States.

[64 FR 5352, Feb. 3, 1999, as amended at 64 FR 69873, Dec. 14, 1999]

§ 300.3 OMB control numbers.

(a) This table displays control numbers assigned to EDA’s information collection requirements by the Office of Management and Budget (“OMB”) pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96-511. EDA intends that this table comply with Section 3507(f) of the Paperwork Reduction Act, requiring agencies to display a current control number assigned by the Director of OMB for each agency information collection requirement.

(b) Control number table:

| 13 CFR part or section where identified and described | Current OMB control no. |
|---|--------------------------|
| 301 | 0610-0094. |
| 302 | 0610-0094. |
| 303 | 0610-0093. |
| 304 | 0610-0094. |
| 305 | 0610-0094 and 0610-0096. |
| 306 | 0610-0094. |
| 307 | 0610-0094. |
| 308 | 0610-0094 and 0610-0095. |
| 314 | 0610-0094. |
| 315 | 0610-0094. |
| 316 | 0610-0094. |

§ 300.4 Economic Development Administration-Washington, D.C., Regional and Economic Development Representatives.

For addresses and phone numbers of the Economic Development Administration in Washington, D.C., Regional and Field Offices and Economic Development Representatives, refer to EDA’s annual Fiscal Year (FY) Notice of Funding Availability (NOFA).

PART 301—GENERAL ELIGIBILITY AND GRANT RATE REQUIREMENTS

Sec.

301.1 Applicants.

301.2 Area eligibility.

301.3 Strategy required.

301.4 Grant rates.

AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5353, Feb. 3, 1999, unless otherwise noted.

§ 301.1 Applicants.

(a) Eligible applicants are defined in § 300.2 of this chapter.

(b) Except as otherwise provided in part 307 of this chapter, a public or private nonprofit organization applicant must include in its application for assistance, a resolution passed by, or a letter signed by, an authorized representative of a general purpose political subdivision of a State or an Indian tribe, acknowledging that the applicant is acting in cooperation with officials of the political subdivision or Indian tribe, as applicable.

[64 FR 5353, Feb. 3, 1999, as amended at 64 FR 69873, Dec. 14, 1999]

§ 301.2 Area eligibility.

(a) EDA awards public works and development facilities grants under part

§ 301.3

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305 and economic adjustment grants under part 308 for projects to enhance economic development in economically distressed areas.

(b) An area is eligible for a project grant under part 305 or 308 if it has one of the following:

(1) An unemployment rate that is, for the most recent 24-month period for which data are available, at least one percent greater than the national average unemployment rate. For example, if the national average unemployment rate is 6 percent, an area is eligible under this provision if it has an unemployment rate of 7 percent.

(2) Per capita income that is, for the most recent period for which data are available, 80 percent or less of the national average per capita income.

(3) A special need, as determined by EDA, arising from actual or threatened severe unemployment or economic adjustment problems resulting from severe short-term or long-term changes in economic conditions, for example:

(i) Substantial outmigration or population loss;

(ii) Underemployment, that is, employment of workers at less than full time or at less skilled tasks than their training or abilities permit;

(iii) Military base closures or realignments, defense contractor reductions-in-force, or Department of Energy defense-related funding reductions;

(iv) Natural or other major disasters or emergencies;

(v) Extraordinary depletion of natural resources;

(vi) Closure or restructuring of industrial firms, essential to area economies; or

(vii) Destructive impacts of foreign trade.

(c) A non-distressed area [i.e., an area that does not meet the criteria of paragraph (b) of this section] within an Economic Development District is also eligible, provided the project will be of a substantial direct benefit to an area that meets at least one of the criteria of paragraph (b) of this section. A project provides substantial direct benefit if it provides significant employment opportunities for unemployed, underemployed or low income residents.

(d) Normally an area is defined by geographical/political boundaries, e.g., city, county, Indian reservation. However, a smaller area (without regard to political boundaries) is also eligible even though it may be part of a larger community that overall is experiencing low distress. When the boundaries of the project area differ from established political boundaries, the project area must be of sufficient size appropriate to the proposed project, and the applicant must justify the proposed boundaries in relation to the project's benefits to the area.

(e) Eligibility is determined at the time that EDA receives an application and is based on the most recent Federal data available for the area where the project will be located or where the substantial direct benefits will be received. If no Federal data are available to determine eligibility, an applicant must submit to EDA the most recent data available through the government of the State in which the area is located, i.e., conducted by or at the direction of the State government. Other data may be submitted, as appropriate, to substantiate eligibility based on special needs, under paragraph (b)(3) of this section.

(f) EDA may reject any documentation of eligibility that it determines is inaccurate.

(g) There is no area eligibility requirement for a project grant under part 306 or 307.

(h) EDA describes special needs criteria under paragraph (b)(3) of this section in a NOFA.

[64 FR 5353, Feb. 3, 1999, as amended at 64 FR 69873, Dec. 14, 1999]

§ 301.3 Strategy required.

(a) To be eligible for a project grant under part 305 or 308 of this chapter, the application for assistance must include a CEDS acceptable to EDA. The applicant may, however, incorporate by reference a current strategy previously approved by EDA, as an alternative to including the strategy in the application. (Exception: A strategy is not required when a funding request is for planning assistance, e.g., a strategy grant, under part 308 of this chapter.) The strategy must be in conformance

with CEDS requirements under § 303.3 of this chapter.

(b) EDA will approve as acceptable a strategy that it determines meets the requirements of § 303.3 of this chapter. The strategy may be one developed:

- (1) With EDA assistance,
- (2) Under another Federally supported program, or
- (3) Through a local, regional, or State process.

(c) In determining acceptability of a strategy, EDA will take into consideration the circumstances of the application, so that for instance a strategy accompanying an application for assistance immediately following a natural disaster will require less depth and detail than would be the case in other circumstances.

(d) To be acceptable, a strategy must be approved, within one year prior to the date of application, by the entity developing the strategy or by the applicant. In the case of a strategy approved by the applicant, approval must be by the applicant's governing body, or in the case of a State, by the governor or the governor's designee(s).

(e) Before EDA approves a strategy for an area all or partly within the boundaries of an EDD, the EDD organization must be given a 30-day opportunity to review and comment upon such strategy.

[64 FR 5353, Feb. 3, 1999, as amended at 64 FR 69873, Dec. 14, 1999]

§ 301.4 Grant rates.

(a) Except as otherwise provided for in this chapter, the amount of the EDA grant may not exceed 50 percent of the cost of the project. Cash or in-kind contributions, fairly evaluated by EDA, including contributions of space, equipment, and services, may provide the non-Federal share of the project cost. In-kind contributions must be eligible project costs and meet applicable Federal cost principles and uniform administrative requirements.

(b) EDA may supplement the Federal share of a grant project where the applicant is able to demonstrate that the non-Federal share that would otherwise be required cannot be provided because of the overall economic situation. It is not necessary for an applicant to prove that it would be impossible to provide a full 50 percent non-Federal share, but it must show circumstances warranting any reduction. In determining whether to provide a Federal share greater than 50 percent for a project, EDA will give due consideration to the applicant's economic situation and the relative needs of the area. In the case of Indian tribes, EDA may reduce or waive the non-Federal share, and in other cases EDA may reduce the non-Federal share of the cost of the project below 50 percent, in accordance with the following table, showing the maximum Federal grant rate, including the supplement:

| Projects | Maximum grant rates (percentage) |
|--|----------------------------------|
| (1) Projects of Indian tribes where EDA has made a determination to waive the non-Federal share of the cost of the project. | 100 |
| (2) Projects under Part 308 located in Presidentially-declared disaster areas for which EDA receives an application for assistance under a supplemental appropriation, within 18 months of the date of declaration, and for which the President established a rate of Federal participation, based on the public assistance grant rate of the Federal Emergency Management Agency (FEMA) for the disaster, of greater than 80 percent. | 100 |
| (3) Projects of Indian tribes where EDA has made a determination to reduce the non-Federal share of the cost of the project. | Less than 100 |
| (4) Projects of States or political subdivisions of States that have exhausted their effective taxing and/or borrowing capacity, or nonprofit organizations that have exhausted their borrowing capacity. | Less than 100 |
| (5) Projects under Part 308 located in Presidentially-declared disaster areas for which EDA receives an application for assistance under a supplemental appropriation, within 18 months of the date of declaration. | 80 |
| (6) Projects located in Federally-declared disaster areas, for which EDA receives an application for assistance within 18 months of the date of declaration, when the Assistant Secretary determines that the applicant cannot provide the required non-Federal share because of the disaster's impact on the economic situation. | 80 |
| (7) Projects located in eligible areas where: | |
| (i) The 24-month unemployment rate is at least 225% of the national average or | |
| (ii) The per capita income (PCI) is not more than 50% of the national average | 80 |
| (8) Projects located in eligible areas that are not eligible for a higher rate, where: | |
| (i) The 24-month unemployment rate is at least 180% of the national average or | |
| (ii) The PCI is not more than 60% of the national average | 70 |

| Projects | Maximum grant rates (percentage) |
|--|-------------------------------------|
| (9) Projects located in eligible areas that are not eligible for a higher rate, where: | |
| (1) The 24-month unemployment rate is at least 150% of the national average or | |
| (2) The PCI is not more than 70% of the national average | 60 |
| (10) Projects in all other eligible areas | 50 |

(c) The table in paragraph (b) of this section does not apply to projects which support the on-going operations of Economic Development Districts or University Centers. Grant rates for those projects are provided in part 306 and subpart B of part 307, of this chapter, respectively.

(d) Projects located in designated Economic Development Districts are eligible for an amount of additional Federal grant assistance not to exceed 10 percent of the estimated cost of the project, provided

(1) The project applicant is actively participating in the economic development activities of the district;

(2) The project is consistent with the strategy of the district; and

(3) The non-Federal share of the project is not less than 20 percent.

(4) The project is not a University Center project under subpart B of part 307, of this chapter; and

(5) The district organization is not itself the sole project applicant. Projects (other than planning projects under part 306 of this chapter) for which the district organization is a co-applicant are eligible for the incentive if the co-applicant with the district is actively participating in the economic development activities of the district and the project is otherwise eligible for such incentive. Planning projects under part 306 of this chapter for which the district organization is an applicant or a co-applicant are not eligible for the 10 percent increase in assistance.

(e) EDA may make grants to supplement grants awarded in other Federal grant programs.

(1) Supplemental grants under paragraph (e) of this section are only available for projects:

(i) Under Federal grant programs that

(A) Provide assistance in the construction or equipping of public works,

public service, or development facilities, and

(B) Are designated by EDA as eligible for supplemental EDA grants, and

(ii) Are consistent with a strategy.

(2) EDA's funds combined with funds from another Federal grant program may be at the maximum EDA grant rate, as set forth above, even if the other Federal program has a lower grant rate. If the other Federal program has a grant rate higher than the maximum EDA grant rate as set forth above, the combination of funds may exceed the EDA rate provided the EDA share does not exceed the EDA rate.

(f) An applicant is eligible for the highest applicable maximum grant rate, as set forth above, in effect between the time EDA invites the application and the time the project is approved. The Federal share of a project receiving EDA grant assistance may be (and often is) less than the maximum grant rate for which the recipient is eligible.

(g) EDA's NOFA will provide additional criteria to ensure that the level of economic distress of an area, rather than a preference for a geographic area or a specific type of economic distress, is the primary factor in allocating assistance.

[64 FR 5353, Feb. 3, 1999, as amended at 64 FR 32975, June 18, 1999; 64 FR 69873, Dec. 14, 1999]

PART 302—ECONOMIC DEVELOPMENT DISTRICTS; STANDARDS FOR DESIGNATION, MODIFICATION AND TERMINATION

Sec.

302.1 Designation of Economic Development Districts.

302.2 Designation of nonfunded districts.

302.3 District organizations.

302.4 District organization functions and responsibilities.

302.5 Modification of district boundaries.

302.6 Termination and suspension of district designation.

302.7 Eligibility of non-distressed areas.

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AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5355, Feb. 3, 1999, unless otherwise noted.

§ 302.1 Designation of Economic Development Districts.

EDA will designate a proposed district as an Economic Development District with the concurrence of the State or States in which the District will be wholly or partially located, when the proposed district meets the following requirements:

(a) It is of sufficient size or population, and contains sufficient resources, to foster economic development on a scale involving more than a single eligible area;

(b) It has an EDA approved strategy which:

(1) Contains a specific program for intra-district cooperation, self-help, and public investment;

(2) Is approved by each affected State;

(3) Identifies problems, and conditions underlying economic distress in the district; and

(4) Promotes economic development opportunities, plans for transportation access, enhancement and protection of the environment and balances resources through sound management of development;

(c) It contains at least one area, eligible for assistance under §301.2, that has been identified in an approved strategy;

(d) At least a majority of the counties, or other areas as determined by EDA, within the proposed district boundaries have submitted documentation of their commitment to support the economic development activities of the district;

(e) A district organization has been established in the proposed district which meets the requirements of §302.4; and

(f) The proposed district organization requests such designation.

§ 302.2 Designation of nonfunded districts.

The continuing designation of any Economic Development District is subject to the criteria and organization requirements of this part whether or not

the Economic Development District organization receives any EDA financial assistance.

§ 302.3 District organizations.

(a) The district shall be organized in one of the following ways:

(1) As a public organization through an intergovernmental agreement for the joint exercise of local government powers; or

(2) As a public organization established under State enabling legislation for the creation of multi-jurisdictional area wide planning organizations; or

(3) As a non-profit organization incorporated under the laws of the State in which it is located.

(b) Each district organization must meet EDA requirements concerning membership composition [§302.3(c)], the maintenance of adequate staff support to perform its economic development functions [§302.3(d)], and its authorities and responsibilities for carrying out economic development functions [§302.4]. Such requirements must also be met by the board of directors (or other governing body of the organization) as a whole.

(c) The district organization shall demonstrate that its governing body meets all of the following requirements:

(1) It is broadly representative of the principal economic interests of the district area including the interests of its minority and low-income populations;

(2) There is at least a simple majority of its membership who are elected officials and/or employees of a general purpose unit of local government who have been appointed to represent the government; and

(3) At least 20 percent of its membership who are private citizens, i.e., neither elected officials of a general purpose unit of local government nor employees of such a government who have been appointed to represent that government.

(d) The district organization shall be assisted by a professional staff drawn from qualified persons in economic development, planning or related disciplines. EDA may provide planning grants to Economic Development Districts to employ professional staff in

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accordance with part 306 of this chapter.

(e) The governing bodies of district organizations shall provide access for persons who are not members to make their views known concerning ongoing and proposed district activities in accordance with the following requirements:

(1) The economic development district organization must hold meetings open to the public at least once a year and shall also publish the date and agenda of the meeting enough in advance to allow the public a reasonable time to prepare to participate effectively.

(2) The district organization shall adopt a system of parliamentary procedures to assure that board members and others have access to and an effective opportunity to participate in the affairs of the district.

(3) Information should be provided sufficiently in advance of public decisions to give the public adequate opportunity to review and react to proposals. District organizations should seek to relate technical data and other material to the public so they may understand the impact of public programs, available options and alternative decisions.

§ 302.4 District organization functions and responsibilities.

(a) All Economic Development District organizations are responsible for seeing that the following are provided on a continuing basis, consistent with the requirements of § 302.3:

(1) Organizational actions, including:

(i) Arranging the legal form of organization which will be used;

(ii) Arranging for the membership of the governing body to meet § 302.3 requirements;

(iii) Recruiting staff to carry out the economic development functions;

(iv) Establishing a management system;

(v) The inclusion of private citizens who are not officials of or employees appointed by the officials of a general purpose unit of local government;

(vi) Contracting for services to carry out district functions;

(vii) Establishing and directing activities of economic development subcommittees; and

(viii) Submitting reports as determined by EDA to comply with civil rights requirements under part 317 of this chapter.

(2) Actions to develop and maintain the required district strategy, and any subsequent supplements or revisions, including:

(i) Preparing the analytic, strategic and implementation components of the strategy;

(ii) Adopting the strategy by formal action of the Economic Development District governing board;

(iii) Submitting the strategy, any supplements or revisions and annual reports for reviews by appropriate governmental bodies and interested organized groups, and attaching dissenting opinions and comments received; and

(iv) Submitting to EDA an approvable strategy.

(b) District organizations receiving EDA financial assistance for the development and implementation of Comprehensive Economic Development Strategies must also:

(1) Coordinate and implement economic development activities in the district, including:

(i) Assisting other eligible units within the district to apply for grant assistance for economic development purposes;

(ii) Carrying out economic development related research, planning, implementation and advisory functions as are necessary to the development and implementation of the strategy;

(2) Coordinate the development and implementation of the strategy with other local, State, Federal and private organizations (including minority organizations);

(3) Carry out the annual strategy for implementation; and

(4) Comply with the requirement of part 303.

[64 FR 5355, Feb. 3, 1999, as amended at 64 FR 69874, Dec. 14, 1999]

§ 302.5 Modification of district boundaries.

EDA, at the request of a district and with concurrence of the State or States affected (unless such concurrence is

waived by the Assistant Secretary), may modify the boundaries of a district, if it determines that such modification will contribute to a more effective program for economic development.

§ 302.6 Termination and suspension of district designation.

EDA may, upon 60 days prior written notice to the district organization, member counties or other areas as determined by EDA, and each affected State, terminate the designation status of an Economic Development District:

(a) When the district no longer meets the standards for designation as set forth above;

(b) When a district has not maintained a currently approved strategy in accordance with part 303 of this chapter; or

(c) When a district has requested termination.

[64 FR 5355, Feb. 3, 1999, as amended at 64 FR 69874, Dec. 14, 1999]

§ 302.7 Eligibility of non-distressed areas.

Areas in districts which are not themselves eligible for assistance under parts 305 or 308 may be eligible, as provided in § 301.2(c).

PART 303—PLANNING PROCESS AND STRATEGIES FOR DISTRICT AND OTHER PLANNING ORGANIZATIONS SUPPORTED BY EDA

Sec.

303.1 Definitions, purpose and scope.

303.2 Planning process.

303.3 Requirements for a strategy.

AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5356, Feb. 3, 1999, unless otherwise noted.

§ 303.1 Definitions, purpose and scope.

(a) As used in this part 303. (1) *Planning organization* means an Economic Development District organization, Indian tribe, or other recipient of an EDA grant under part 306 of this chapter which grant is awarded in whole or in part to develop, update, or replace a CEDS, and

(2) *Strategy committee* means that committee or other entity identified by the planning organization as responsible for developing, updating, or replacing a strategy.

(b) This part describes the planning process of and requirements for strategies developed and implemented by planning organizations supported by EDA. Though the strategy requirements are the same under all EDA programs which call for a strategy, the planning process and reporting and updating requirements for EDA supported planning organizations are more stringent.

[64 FR 5356, Feb. 3, 1999, as amended at 64 FR 69874, Dec. 14, 1999]

§ 303.2 Planning process.

(a) The strategy committee must be inclusive and representative of the main economic interests of the area covered by the strategy. Such interests include public officials, community leaders, private individuals, business leaders, labor groups, minorities, and others who can contribute to and benefit from improved economic development in the area covered.

(b) The planning organization must support the strategy committee with a staff skilled in economic planning or related fields.

(c) The planning organization must conduct an initial and continuous study and analysis of the opportunities for economic development and of problems contributing to economic and related distress in the area covered, such as, for example, unemployment, underemployment, outmigration, or low per capita income, and possible solutions to such problems.

(d) Planning organizations covered by this part 303 must submit an initial strategy to EDA in compliance with the requirements of § 303.3, as determined by EDA. Each year thereafter, the planning organization must submit an annual strategy report, acceptable to EDA.

(e) A new or revised strategy is required at least every five years, or sooner if EDA or the planning organization determines that the strategy is inadequate due to changed circumstances. Each strategy must be available for review and comment by

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appropriate government bodies and interest groups in the area covered. Strategies submitted by Districts require a 30 day opportunity for review and comment by the Governor or Governors, or designee(s), of the State or States in which they are located, prior to EDA approval.

(f) If EDA identifies any deficiencies, it will notify the organization in writing and provide the organization a reasonable opportunity to remedy such deficiencies.

[64 FR 5356, Feb. 3, 1999, as amended at 64 FR 69874, Dec. 14, 1999]

§ 303.3 Requirements for a strategy.

A strategy must be the result of a continuing economic development planning process, developed with broad-based and diverse community participation, and contain the following:

(a) An analysis of economic and community development problems and opportunities including incorporation of any relevant material or suggestions from other government sponsored or supported plans;

(b) Background and history of the economic development situation of the area covered, with a discussion of the economy, including as appropriate, geography, population, labor force, resources, infrastructure, transportation systems, and the environment;

(c) A discussion of community participation in the planning efforts;

(d) A section setting forth goals and objectives for taking advantage of the opportunities of and solving the economic development problems of the area serviced;

(e) A plan of action, including suggested projects to implement objectives and goals set forth in the strategy; and

(f) Performance measures that will be used to evaluate whether and to what extent goals and objectives have been or are being met.

[64 FR 5356, Feb. 3, 1999, as amended at 64 FR 69874, Dec. 14, 1999]

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PART 304—GENERAL SELECTION PROCESS AND EVALUATION CRITERIA

Sec.

304.1 Project proposal, application, selection and evaluation for programs under PWEDA.

304.2 How EDA evaluates proposals and applications for projects funded under PWEDA.

AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10–4.

SOURCE: 64 FR 5357, Feb. 3, 1999, unless otherwise noted.

§ 304.1 Project proposal, application, selection and evaluation for programs under PWEDA.

(a) *Local projects.* If you are or represent a party eligible to be an applicant, and are interested in a public works, economic adjustment, planning, local technical assistance or university center project grant, you should contact the appropriate Economic Development Representative (EDR) (or EDA Regional or headquarters office), identified in the NOFA. The EDR or other EDA official is available to provide program information, including the current published NOFA; provide a proposal form approved by the U.S. Office of Management and Budget (OMB), and provide assistance as needed in filling out the proposal form.

(1) After submission of the proposal to the appropriate EDR or Regional Office of EDA, the appropriate Regional Office Project Review Committee (PRC), consisting of at least three EDA officials, will review the proposal. The EDR or other appropriate EDA official will evaluate the proposal under § 304.2, program specific sections of this rule, and the NOFA, if applicable, before submitting it to the EDA Regional Office for its review.

(2) After review by the PRC, EDA will send a letter in a timely manner to each submitter advising either that:

(i) EDA invites the submitter to prepare and present a formal application on a standard application form, with attachments for the type of grant being requested; or

(ii) EDA returns the proposal because of specified deficiencies and suggests resubmission when the deficiencies are cured; or

(iii) EDA denies the proposal for specifically stated reasons.

(b) *National technical assistance, training, research, or evaluation projects.* If you are or represent a party eligible to be an applicant, and are interested in a national technical assistance, training, research, or evaluation project under PWEDA, you should make initial contact with EDA in Washington, D.C., at locations identified in the NOFA, for information and assistance concerning proposals and to obtain program information, including a copy of the current NOFA, and OMB approved proposal form. After submission of the proposal to the appropriate EDA Washington, D.C. office, generally, three or more technically knowledgeable EDA officials will review the proposal for relevance and quality.

(1) If EDA determines that the proposal is acceptable under §304.2, program specific sections of this chapter, and the NOFA, if applicable, EDA may by letter invite the submitter to provide an application with a more detailed and comprehensive project narrative.

(2) If EDA determines that the proposal is not acceptable because of specified deficiencies, EDA will so notify the submitter in writing in a timely manner.

(c) Additional criteria, or priority consideration factors for assistance, may be set forth in a NOFA.

(d) EDA expects that applications will generally be submitted within 30 days after receipt of an invitation letter. EDA's invitation to submit an application does not assure EDA funding.

[64 FR 5357, Feb. 3, 1999, as amended at 64 FR 69874, Dec. 14, 1999]

§304.2 How EDA evaluates proposals and applications for projects funded under PWEDA.

(a) General proposal and application evaluation criteria for projects funded under PWEDA are as follows: EDA will screen all proposals/applications for conformance to statutory and regulatory requirements, the reasonable-

ness of the budget presented, and the following criteria:

(1) The relative severity of the economic problem of the area,

(2) The quality of the scope of work proposed to address the problem,

(3) The merits of the activity(ies) for which funding is requested, and

(4) The ability of the prospective applicant to carry out the proposed activity(ies) successfully.

(b) EDA will also review applications for conformance with any additional program specific evaluation criteria as stated in applicable sections of these rules or the NOFA.

(c) The NOFA may identify special areas of interest or priority consideration for the period of such NOFA.

[64 FR 5357, Feb. 3, 1999, as amended at 64 FR 69875, Dec. 14, 1999]

PART 305—GRANTS FOR PUBLIC WORKS AND DEVELOPMENT FACILITIES

Subpart A—General

Sec.

305.1 Purpose and scope.

305.2 Criteria.

305.3 Application requirements.

305.4 Selection and evaluation.

Subpart B—Other Requirements

305.5 Pilot program.

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305.7 Selection of the Architect/Engineer.

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305.11 Design/Build method of construction.

305.12 Advertising for bids.

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305.15 Contract award.

305.16 Construction progress schedule.

305.17 Project sign.

305.18 Occupancy prior to completion.

305.19 Contract change orders.

305.20 Project development time schedule.

305.21 Controlling budget.

305.22 Services performed by the recipient's own forces.

305.23 Public Works projects for design and engineering work.

305.24 Disbursements of funds for grants.

305.25 Final inspection.

305.26 Reports.

AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

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SOURCE: 64 FR 5358, Feb. 3, 1999, unless otherwise noted.

Subpart A—General

§ 305.1 Purpose and scope.

The purpose of Public Works and Development Facilities grants is to help the Nation's distressed communities revitalize and expand their physical and economic infrastructure and thereby provide support for the creation or retention of jobs for area residents by helping eligible recipients with their efforts to promote the economic development of distressed areas. The primary focus is on the creation of new, or the retention of existing, long-term private sector job opportunities in communities experiencing significant economic distress as evidenced by high unemployment, low income, or a special need arising from actual or threatened severe unemployment or severe changes in local economic conditions. These grants are intended to help communities achieve sustainable economic development by developing and expanding new and existing public works and other infrastructure facilities that will help generate long-term jobs and economic growth, improve economic conditions or otherwise enhance and promote the economic recovery of the area.

§ 305.2 Criteria.

(a) A grant may be made under part 305 for the following purposes:

(1) For the acquisition or development of land and improvements for use for a public works, public service or other type of development facility; or

(2) For the acquisition, design and engineering, construction, rehabilitation, alteration, expansion, or improvement of such a facility, including related machinery and equipment.

(b) A grant may be made under part 305 only when:

(1) The project for which the grant is applied for will, directly or indirectly—

(i) Improve the opportunities, in the area where the project is or will be located, for the successful establishment or expansion of industrial or commercial plants or facilities;

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(ii) Assist in the creation of additional long-term employment opportunities in the area; or

(iii) Primarily benefit the long-term unemployed and members of low-income families;

(2) The project for which the grant is applied for will fulfill a pressing need of the area, or a part of the area, in which the project is or will be located; and

(3) The area for which the project is to be carried out has a strategy and the project is consistent with the strategy.

(c) Maximum assistance for each State. Not more than 15 percent of the annual appropriations available to carry out this part may be expended in any one State.

[64 FR 5358, Feb. 3, 1999, as amended at 64 FR 69875, Dec. 14, 1999]

§ 305.3 Application requirements.

Each application for a grant under part 305 must:

(a) Include evidence of area and applicant eligibility;

(b) Include, or incorporate by reference, a strategy, as provided in § 301.3;

(c) Identify the sources of the other funds, both eligible Federal and non-Federal, that will make up the balance of the proposed project's financing, including any private sources of financing. The application must show that such other funds are committed to the project and will be available as needed. The local share must not be encumbered in any way that would preclude its use consistent with the requirements of the grant; and

(d) Explain how the proposed project meets the criteria of § 305.2.

§ 305.4 Selection and Evaluation.

(a) Projects will be selected in accordance with the application evaluation criteria set forth in § 304.2 of this chapter.

(b) In addition to the evaluation criteria set forth in part 304 of this chapter, project selection and evaluation will be made on the basis of whether, and to what extent, the proposed project will:

(1) Assist in creating new or retaining existing private sector jobs and assist in the creation of additional long-

term employment opportunities rather than merely transferring jobs from one area of the country to another;

(2) Be supported by significant private sector investment;

(3) Leverage or be a catalyst for the effective use of private, local government, State or other Federal funding that is available;

(4) Likely be started and completed in a timely fashion; and

(5) If the project is located in an area with a stable economy and low distress, provide employment opportunities for residents of nearby areas of high distress.

Subpart B—Other Requirements

§ 305.5 Pilot program.

(a) The Chicago Regional Office (CRO) has been authorized to conduct a pilot program through December of 1999 to develop simplified and streamlined procedures for monitoring approved EDA construction projects. Other EDA regional offices have been authorized to conduct their own pilot programs for monitoring compliance with the post-approval project management requirements, provided they first obtain the approval of the Deputy Assistant Secretary for Program Operations. The knowledge and efficiencies gained from the pilot programs will be evaluated and used to improve and revise EDA's post-approval project management requirements and procedures.

(b) As part of this pilot program, the procedures developed by CRO vary from those listed in this subpart B of part 305 in that they place greater reliance on a recipient's certification of compliance. No additional requirements are imposed by CRO procedures. CRO provides guidelines, in its version of the "Requirements for Approved Projects," to all recipients of grants for construction projects monitored by the CRO. The recipient is not required to submit to EDA certain documentation at any set time, but is required to maintain all documentation supporting any and all certifications submitted to CRO, for the period of time provided in 15 CFR part 14 or 24, as appropriate.

[64 FR 69875, Dec. 14, 1999]

§ 305.6 Project management conference.

After the EDA financial assistance award has been accepted by the recipient, EDA may schedule a planning conference with the recipient's representatives to explain the post-approval requirements for administration of the EDA assisted project.

[64 FR 69875, Dec. 14, 1999]

§ 305.7 Selection of the Architect/Engineer.

Guidelines for the selection of the Architect/Engineer (A/E), services to be performed by the A/E, contract provisions for those services and eligible fees for the A/E are as follows:

(a) Selection of the A/E may be by sealed bids using formal advertising or by competitive proposal procedures subject to negotiation of fair and reasonable compensation. The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(b) The A/E agreement shall provide for all services required by the recipient for the engineering feasibility, design and contract administration of the proposed project. Appropriate standards or guides developed by such professional organizations as the American Consulting Engineers Council, American Society of Civil Engineers, National Society of Professional Engineers, and/or the American Institute of Architects may be used where the grantee does not have standard procurement/contract documents.

(c) Exhibit A-1, Checklist for Architect/Engineer Services, in the EDA publication, *Requirements for Approved Construction Projects*, displayed at EDA's Web Site, <http://www.doc.gov/eda> (a copy of this publication is available from EDA and a copy will be furnished to an award recipient with the Offer of Financial Assistance), lists the contract provisions which EDA recommends for the A/E contract. The A/E agreement must be furnished to EDA in order for the allowability of the costs of A/E services to be determined.

(d) Eligible project costs may include, but not be limited to, costs for

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A/E fees, resident inspection, test borings, and the testing of materials provided under an agreement or contract with the recipient. The A/E fees should be in conformity with similar costs and projects in the area.

[64 FR 69875, Dec. 14, 1999]

§ 305.8 Project phasing.

The recipient is strongly urged to award all contracts for construction at one time.

(a) Where compelling reasons justify phasing the project, the recipient must secure the approval of EDA for phasing prior to advertising any portion for bid.

(b) The recipient's request for approval of phasing must include valid reasons justifying the request and a statement from the recipient that it can, and will, fund any overrun that arises in the later phases.

(c) Normally, EDA will not disburse funds until all construction contracts have been awarded, (an exception is the development of an underground source of water when required to determine the availability of an adequate source of water supply in terms of both quality and quantity as described in the grant application).

(d) Disbursement of grant funds by phases must be approved by EDA. Such approvals will be given only if the recipient can demonstrate that a severe hardship will result if such approval is not given and there are compelling reasons why all phases cannot be contracted for at the same time.

(e) The recipient must be capable of paying incurred costs prior to the first disbursement of EDA grant funds.

[64 FR 69875, Dec. 14, 1999]

§ 305.9 Recipient furnished equipment and materials.

The recipient may wish to incorporate into the project equipment and/or materials which it will secure through its own efforts.

(a) It is the responsibility of the recipient to assure that such equipment and/or materials are adequate for the proposed use.

(b) The use of such equipment and materials must be approved by EDA to be eligible for EDA financial participa-

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tion. The recipient shall be required to submit with its request for approval either a paid invoice or current quotes from not less than three suppliers who normally distribute such equipment and/or materials. EDA may require that major equipment items be subject to a lien in favor of EDA and may also require a statement from the Recipient regarding expected useful life and salvage value.

(c) The recipient must be prepared to show that the cost claimed for such equipment and/or materials is competitive with local market costs.

(d) Acquisitions of recipient furnished equipment and/or materials under this section is subject to the requirements of 15 CFR part 24 or 15 CFR part 14.

[64 FR 69875, Dec. 14, 1999]

§ 305.10 Construction Management services.

Construction Management is defined as the services of a firm with competent and experienced staff to act as the recipient's agent to perform all or part of project administration. EDA will not normally approve the use of a Construction Management firm for projects costing less than \$5 million. EDA will participate in such cost only if EDA approves the contract for such services.

[64 FR 69876, Dec. 14, 1999]

§ 305.11 Design/Build method of construction.

EDA discourages the use of the same entity to both design and to build EDA assisted facilities. If the recipient desires to use such a method, its use must be justified and EDA must approve the contract. The procurement of, and the compensation to, the designer/builder will be subject to the same rules as for the procurement of construction services.

[64 FR 69876, Dec. 14, 1999]

§ 305.12 Advertising for bids.

In the absence of State or local law to the contrary, the advertisement for bids for construction projects should appear in publications of general circulation a minimum of four times within a 30-day period prior to the

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opening of bids. Additional circulation of the invitation for bids is encouraged if it is needed to obtain the coverage necessary to secure competitive bids. Generally, a minimum of 30 days should be allowed for submission of bids.

[64 FR 69876, Dec. 14, 1999]

§ 305.13 Bid overrun.

If at the construction contract bid opening the lowest responsive bid less deductive alternates, if any, exceeds the funds available for construction, the recipient may reject all bids or augment the funds available in an amount sufficient to enable the award to be made to the low bidder. If available, the recipient may take deductive alternates in the order given in the Invitation for Bids until at least one of the responsive bids less deductive alternates results in a price within the funds announced as available prior to the bid opening. The award then may be made to that bidder. Additional information on the procedures to be followed is in the EDA publication, *Requirements for Approved Construction Projects*.

[64 FR 69876, Dec. 14, 1999]

§ 305.14 Bid underrun.

If at the construction contract bid opening, the lowest responsive bid is less than the funds available for construction, EDA must be notified immediately to determine whether any unneeded grant funds should be deobligated.

[64 FR 69876, Dec. 14, 1999]

§ 305.15 Contract award.

EDA must concur in the award of all necessary contracts for design and construction of the EDA assisted facility in order for the cost to be eligible for EDA reimbursement. Pending EDA approval of the construction contract(s), the recipient may issue the notice to proceed permitting the work to go forward. If the work does go forward prior to EDA approval, the recipient will be proceeding at its own risk pending EDA review and concurrence. The EDA

regional office will advise the recipient of the documents that are required to obtain EDA approval.

[64 FR 69876, Dec. 14, 1999]

§ 305.16 Construction progress schedule.

If requested by EDA, the recipient will secure from the contractor or A/E and furnish a copy to EDA of the estimated construction progress chart and a schedule of amounts for contract payments. The construction progress chart should be updated monthly by the recipient, the A/E or the contractor, and an up-to-date copy furnished to EDA quarterly throughout the construction of the project.

[64 FR 69876, Dec. 14, 1999]

§ 305.17 Project sign.

The recipient shall be responsible for the construction, erection, and maintenance in good condition throughout the construction period, of a sign or signs, (recommended specifications for the sign are included as an exhibit to the EDA publication, *Requirements for Approved Construction Projects*) at the project site in a conspicuous place indicating that the Federal government is participating in the project. EDA may require more than one sign if the project's location so warrants. The recipient should confer with the EDA regional office for suggestions on where the sign(s) should be located.

[64 FR 69876, Dec. 14, 1999]

§ 305.18 Occupancy prior to completion.

If the project or any part of it is to be occupied or used prior to the project's acceptance from the contractor, the recipient must notify EDA of the intent to occupy or use the facility and the effective date of the occupancy or use, secure the written consent of the contractor; secure an endorsement from the insurance carrier and consent of the surety company permitting occupancy or use during the

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period of construction; secure permanent fire and extended coverage insurance and, when required, secure a permit to occupy the facility from the appropriate authority, e.g. the local building inspector.

[64 FR 69876, Dec. 14, 1999]

§ 305.19 Contract change orders.

After construction contracts have been executed, it may become necessary to alter them. This requires a formal contract change order, issued by the recipient and accepted by the contractor.

(a) All contract change orders must be concurred in by EDA even if the recipient is to pay for all additional costs resulting from the change or the contract price is to be reduced.

(b) The work on the project may continue pending EDA review and concurrence in the change order but the recipient should be aware that all such work will be at the recipient's risk as to whether the cost for the work will be an eligible project cost for EDA participation until EDA concurrence is received.

(c) EDA will not approve financial participation in change orders that are solely for the purpose of using excess funds resulting from an underrun of one or more of the items in the approved project budget.

(d) EDA approval of change orders must be based on a finding by EDA that the work called for in the change order is within the project scope and is required for satisfactory operation or functioning of the project.

[64 FR 69876, Dec. 14, 1999]

§ 305.20 Project development time schedule.

The recipient is responsible for expeditiously prosecuting the implementation of the project in accordance with the project development time schedule contained in the EDA grant award. As soon as the recipient becomes aware that it will not be possible to meet the time schedule, it must notify the EDA Regional Office.

[64 FR 69876, Dec. 14, 1999]

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§ 305.21 Controlling budget.

The tabulation of estimated project costs contained in the EDA grant award is the controlling budget for the project.

(a) Budget line item revisions, including the addition of a new line item, which do not involve a change of scope may be approved by EDA if no new EDA funds are involved; another budget line item (preferably the contingency line item, although this is not mandatory) has funds which can be used without significantly adversely affecting the object of that line item; and unless the line item that is proposed to be supplemented is supplemented, the activity associated with that line item cannot be completed.

(b) The recipient shall notify EDA of any proposed transfer of funds from one budget line item to another. The recipient's attention is called to the fact that the addition of a new line item to the approved budget may involve an impermissible change of scope and, therefore, may result in such costs being excluded from EDA's participation. Accordingly, the recipient is advised to discuss the need to add a new line item to the approved budget with EDA regional office staff before any costs are incurred under such new line item.

[64 FR 69877, Dec. 14, 1999]

§ 305.22 Services performed by the recipient's own forces.

The recipient may wish to have a portion or all of the design, construction, inspection, legal services or other work and/or services in connection with the project performed by personnel who are employed by the recipient either full or part time (in-house). Due to the difficulty in monitoring in-house construction and the limited EDA staff available to perform the monitoring, in-house construction is discouraged.

(a) If EDA approves the use of the recipient's in-house forces to construct all or part of the EDA assisted project and the in-house forces are to be augmented by personnel hired specifically for the EDA assisted project, the hourly wages to be paid to such personnel shall be the same as the hourly wages

paid to full time personnel of the recipient doing the same or similar work. If the nature of the work is not similar and/or there is not an established wage scale, the prevailing state or county hourly wage for public employees shall be obtained from the appropriate state or county agency and used for the newly established position. However, non-profit recipients must pay all personnel employed for the construction of the EDA assisted project the prevailing hourly wages for the area as established by the U.S. Department of Labor.

(b) The use of in-house forces for construction may be approved by EDA if:

(1) The recipient has a special skill required for the construction of the project, *e.g.*, construction of unique Indian structures, or

(2) The recipient has made all reasonable efforts to obtain a contractor but has failed to do so because of uncontrollable factors such as the remoteness of the project site or an overabundance of construction work in the project area, or

(3) Substantial cost savings can be demonstrated.

[64 FR 69877, Dec. 14, 1999]

§ 305.23 Public Works projects for design and engineering work.

In general, EDA prefers to award a Public Works grant that includes all of the costs required for the successful completion of a project, including the design and engineering work.

(a) When the purpose of the Public Works project is to accomplish only the design and engineering work for a proposed future construction project, EDA may award a grant for the design and engineering work with the understanding that EDA cannot make a commitment against a future fiscal year appropriation to fund the proposed construction project.

(b) The purpose of the EDA assisted project for design and engineering work is to produce all of the documents required for the construction of the proposed future project in a format and in sufficient quantity to permit a construction contract to be advertised and awarded soon after the project's construction financing has been arranged. The EDA document, *Requirements for*

Approved Construction Projects, should be used to ensure that the proposed construction project meets all applicable Federal requirements.

(c) Design and engineering projects will not generally be considered unless the nature of the proposed project to be considered is complex or environmentally sensitive and EDA makes a determination that it is in the best interest of the Government to award a separate grant for design and engineering.

(d) EDA requires the design/engineering contract to be submitted to and approved by EDA before any EDA grant funds can be disbursed.

[64 FR 69877, Dec. 14, 1999]

§ 305.24 Disbursements of funds for grants.

(a) Disbursements of funds for construction grants are generally made on a reimbursable basis on request of the recipient for reimbursement. Disbursements may be made only:

(1) After execution of all contracts required for the completion of the project. This condition may be waived by EDA if the grantee can demonstrate that enforcement of the condition would place an undue burden on it;

(2) For itemized and certified eligible costs incurred, as substantiated by such documentary evidence as EDA may require;

(3) On the basis of the work accomplished and the percentage of EDA participation, but in no event for more than the total sum stated in the financial assistance award accepted by the grantee;

(4) Upon such evidence as EDA may require that grantee's proportionate share of funds not yet expended is on deposit;

(5) After a determination by EDA that all applicable terms and conditions of the grant have been met; and

(6) After meeting such other requirements as EDA may establish in accordance with other Federal laws, rules and regulations.

(b) Disbursements are generally made in installments, based upon grantee's actual rate of disbursement in accordance with the grant rate.

(c) Advances of funds are allowable when disbursement on a reimbursable

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basis would impose an undue burden, as determined by EDA, upon the recipient.

[64 FR 5358, Feb. 3, 1999, Redesignated and amended at 64 FR 69875, 69877, Dec. 14, 1999]

§ 305.25 Final inspection.

A final inspection will be scheduled by the recipient and appropriate notification given to EDA, when the project has been completed and all deficiencies have been corrected. EDA personnel may attend and participate in the final inspection and, in any event, EDA must be advised of the outcome of such final inspection and the recipient's acceptance of the work.

[64 FR 69877, Dec. 14, 1999]

§ 305.26 Reports.

Financial and performance reports requirements will be specified in the Special Award Conditions of the grant. Construction progress schedule reports will be required in § 305.16.

[64 FR 69877, Dec. 14, 1999]

PART 306—PLANNING ASSISTANCE

Sec.

306.1 Purpose and scope.

306.2 Application evaluation criteria.

306.3 Award requirements.

306.4 Post-approval requirements.

AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5427, Feb. 3, 1999, unless otherwise noted.

§ 306.1 Purpose and scope.

The primary objective of planning assistance is to provide funding for administrative expenses to support the formulation and implementation of economic development planning programs and for the conduct of planning activities designed to create and retain permanent jobs and increase incomes, particularly for the unemployed and underemployed in the nation's most economically distressed areas. Planning activities supported by these funds must be part of a continuous process involving the active participation of public officials and private citizens, and include the following:

(a) Analyzing local economies;

(b) Defining economic development goals;

(c) Determining project opportunities; and

(d) Formulating and implementing an economic development program that includes systematic efforts to reduce unemployment and increase incomes.

§ 306.2 Application evaluation criteria.

(a) EDA uses the application evaluation criteria set forth in part 304 of this chapter. In addition, EDA evaluates applications on the following:

(1) Quality of the proposed work program;

(2) Management and staff capacity and qualifications of the applicant organization; and

(3) Extent of broad-based representation including for example, involvement of the local civic, business, leadership, labor, minority, and other community interests in the applicant's economic development activities.

(b) Previously funded grantees, in addition to the requirements of paragraph (a) of this section, will also be evaluated on the basis of the quality of their past performance.

§ 306.3 Award requirements.

(a) Planning assistance shall be used in conjunction with any other available Federal planning assistance to ensure adequate and effective planning and economical use of funds.

(b) Grant rate: (1) The maximum Federal grant rate for a project under this part for recipients other than Economic Development Districts is 50 percent, except as supplemented as provided in § 301.4(b) of this chapter.

(2) The maximum Federal grant rate for a project under this part for a district is:

(i) 50 percent, or

(ii) 75 percent, if the project meets the criteria of paragraph (b)(3) of this section.

(3) A district project is eligible for a supplemental grant increasing the Federal share up to and including 75 percent when the applicant is able to demonstrate that:

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(i) The project is intended to address problems arising from actual or threatened high unemployment, low per capita income, or a special need that qualifies an area for eligibility under §301.2(b) of this chapter,

(ii) The project is in significant part devoted to activities addressing the needs of the most economically distressed parts of the total area served by the applicant,

(iii) The applicant is uniquely qualified to address the major causes of actual or threatened economic distress in the area served by the applicant, and

(iv) The applicant cannot provide the non-Federal share otherwise required because in the overall economic situation there is a lack of available non-Federal share due, for instance, to the pressing demand for its use elsewhere.

(4) A project receiving a supplemental grant increasing the Federal share under paragraph (b)(3) of this section is not eligible for additional Federal grant assistance under §301.4(d) of this chapter, i.e., the 10 percent incentive increase for certain projects in districts.

(c) As a condition of the receipt of assistance by a State under this part 306:

(1) The State must have or develop a CEDS;

(2) Any State plan developed with such assistance must be developed cooperatively by the State, political subdivisions of the State, and the economic development districts located wholly or partially within the State;

(3) Any overall State economic development planning assisted under this section shall be a part of a comprehensive planning process that shall consider the provision of public works to:

(i) Promote economic development and opportunity,

(ii) Foster effective transportation access,

(iii) Enhance and protect the environment, and

(iv) Balance resources through the sound management of physical development;

(4) Upon completion of the State plan, the State must,

(i) Certify to EDA that, in the development of the State plan, local and economic development district plans

were considered and, to the maximum extent practicable, the State plan is consistent with the local and economic development district plans; and

(ii) Identify any inconsistencies between the State plan and the local and economic development district plans and provide a justification for each inconsistency; and

(5) The State must submit to EDA an annual report on the planning process so assisted.

[64 FR 5427, Feb. 3, 1999, as amended at 64 FR 69877, Dec. 14, 1999]

§306.4 Post-approval requirements.

Financial, performance and progress reports, and project products will be as specified in the Special Award Conditions of the grant.

[64 FR 5427, Feb. 3, 1999]

PART 307—LOCAL TECHNICAL ASSISTANCE, UNIVERSITY CENTER TECHNICAL ASSISTANCE, NATIONAL TECHNICAL ASSISTANCE, TRAINING, RESEARCH, AND EVALUATION

Subpart A—Local Technical Assistance

Sec.

307.1 Purpose and scope.

307.2 Application evaluation criteria.

307.3 Award and grant rate requirements.

Subpart B—University Center Program

307.4 Post-approval requirements.

307.5 Purpose and scope.

307.6 Application evaluation criteria.

307.7 Award and grant rate requirements.

307.8 Post-approval requirements.

Subpart C—National Technical Assistance, Training, Research, and Evaluation

307.9 Purpose and scope.

307.10 Application evaluation criteria.

307.11 Award and grant rate requirements.

307.12 Post-approval requirements.

AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5427, Feb. 3, 1999, unless otherwise noted.

Subpart A—Local Technical Assistance

§ 307.1 Purpose and scope.

Local Technical Assistance projects are intended to:

- (a) Determine the causes of excessive unemployment, underemployment, low per capita income, or high poverty rates in areas and regions of the Nation;
- (b) Assist in formulating and implementing new economic development tools, models, and innovative techniques that will raise employment and income levels; and
- (c) Assist distressed communities in formulating and implementing new economic development programs to increase the technology and human capacity of the communities. Local Technical Assistance funds may not be used to start or expand a private business.

§ 307.2 Application evaluation criteria.

EDA selects local technical assistance projects for grant awards according to the general application evaluation criteria set forth in part 304 of this chapter and the extent, as appropriate, the project:

- (a) Strengthens the local capacity to undertake and promote effective economic development programs targeted to people and areas of distress;
- (b) Benefits distressed areas;
- (c) Helps to diversify distressed economies;
- (d) Demonstrates innovative approaches to stimulating economic development in distressed areas; and
- (e) Is consistent with the CEDS or other strategy accepted by EDA for the area in which the project is located.

[64 FR 5427, Feb. 3, 1999, as amended at 64 FR 69878, Dec. 14, 1999]

§ 307.3 Award and grant rate requirements.

(a) EDA will provide assistance for the period of time required to complete the project scope of work, generally not to exceed twelve months.

(b) If the project is regional in scope, EDA may determine that the requirement that public or private nonprofit organizations must act in cooperation with officials of a political subdivision

of a State is satisfied by the nature of the project;

(c) Grant rate:

(1) The maximum Federal grant rate for a project under this subpart is:

- (i) 50 percent, except as supplemented as provided in § 301.4(b); or
- (ii) Up to and including 100 percent, if the project is not feasible without, and merits, a reduction or waiver of the non-Federal share required under the rate provided in § 301.4(b).

(2) A project is eligible for a supplemental grant increasing the Federal share up to and including 100 percent when the applicant is able to demonstrate that,

(i) It cannot provide the non-Federal share otherwise required because in the overall economic situation there is a lack of available non-Federal share due, for instance, to the pressing demand for its use elsewhere;

(ii) The project is addressing major causes of distress in the service area and requires the unique characteristics of the applicant, which will not participate in the program if it must provide all or part of a 50 percent non-Federal share; or

(iii) The project is for the benefit of local, State, regional, or national economic development efforts, and will be of no or only incidental benefit to the recipient.

(3) A project receiving a supplemental grant increasing the Federal share under paragraph (c)(2) of this section is not eligible for additional Federal grant assistance under § 301.4(d) of this chapter, *i.e.*, the 10 percent incentive increase for certain projects in districts.

(4) A local technical assistance project is eligible for a Federal grant rate of more than 75 percent, up to 100 percent, only if approved by the Assistant Secretary.

[64 FR 5427, Feb. 3, 1999, as amended at 64 FR 69878, Dec. 14, 1999]

Subpart B—University Center Program

§ 307.4 Post-approval requirements.

Financial reports, progress reports, and project products will be specified

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in the Special Award Conditions of the grant or cooperative agreement.

[64 FR 69878, Dec. 14, 1999]

§ 307.5 Purpose and scope.

The University Center technical assistance program is designed to help improve the economies of distressed areas. It helps institutions of higher education (or other applicants) use their own and other resources to address the economic development problems and opportunities of areas served.

[64 FR 5427, Feb. 3, 1999. Redesignated at 64 FR 69878, Dec. 14, 1999]

§ 307.6 Application evaluation criteria.

EDA selects University Center projects for grant awards according to the general application evaluation criteria set forth in part 304 of this chapter and the extent, as appropriate, the project:

- (a) Has the commitment of the highest management levels of the sponsoring institution;
- (b) Provides evidence of adequate non-Federal financial support, either from the sponsoring institution or other sources;
- (c) Outlines activities consistent with the expertise of the proposed staff, the academic programs, and other resources available within the sponsoring institution;
- (d) Documents past experience of the sponsoring institution in operating technical assistance programs; and
- (e) Balances the geographic distribution of University Centers across the country. Only the Assistant Secretary has the authority to approve the selection for grant assistance of a University Center that has not received University Center assistance for the previous year.

[64 FR 5427, Feb. 3, 1999. Redesignated and amended at 64 FR 69878, Dec. 14, 1999]

§ 307.7 Award and grant rate requirements.

- (a) EDA will provide assistance for the period of time required to complete the project scope of work, generally not to exceed twelve months.
- (b) If the project is regional in scope, EDA may determine that the require-

ment that public or private nonprofit organizations must act in cooperation with officials of a political subdivision of a State is satisfied by the nature of the project;

(c) Financial reports, progress reports and project products will be specified in the Special Award Conditions of the grant or cooperative agreement.

(d) Grant rate:

(1) The maximum Federal grant rate for a project under this subpart is:

(i) 50 percent, or

(ii) 75 percent, if the project is not feasible without, and merits, a reduction or waiver of the non-Federal share.

(2) A project is eligible for a supplemental grant increasing the Federal share up to and including 75 percent when the applicant is able to demonstrate that:

(i) It cannot provide the non-Federal share otherwise required because in the overall economic situation there is a lack of available non-Federal share due, for instance, to the pressing demand for its use elsewhere;

(ii) The project is addressing major causes of distress in the area serviced and requires the unique characteristics of the applicant, which will not participate in the program if it must provide all or part of a 50 percent non-Federal share; or

(iii) The project is for the benefit of local, State, regional, or national economic development efforts, and will be of no or only incidental benefit to the recipient.

(3) A project awarded under this subpart is not eligible for additional Federal grant assistance under the table in § 301.4(b) or the provisions of § 301.4(d) of this chapter, i.e., the 10 percent incentive increase for certain projects in districts.

(e) Direct costs: At least 80 percent of EDA funding must be allocated to direct costs of program delivery.

[64 FR 5427, Feb. 3, 1999. Redesignated and amended at 64 FR 69878, Dec. 14, 1999]

§ 307.8 Post-approval requirements.

Financial reports, progress reports, and project products will be specified

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in the special award conditions of the grant or cooperative agreement.

[64 FR 69878, Dec. 14, 1999]

Subpart C—National Technical Assistance, Training, Research, and Evaluation

§ 307.9 Purpose and scope.

(a) The purposes of National Technical Assistance, Training, Research, and Evaluation projects are:

(1) To determine the causes of excessive unemployment, underemployment, outmigration or other problems indicating economic distress in areas and regions of the Nation;

(2) To assist in formulating and implementing new economic development tools and national, State, and local programs that will raise employment and income levels and otherwise produce solutions to problems resulting from the above conditions;

(3) To evaluate the effectiveness and economic impact of programs, projects, and techniques used to alleviate economic distress and promote economic development, and

(4) To assist in disseminating information about effective programs, projects and techniques that alleviate economic distress and promote economic development.

(b) EDA may during the course of the year, identify specific national technical assistance, training, research or evaluation projects it wishes to have conducted. Ordinarily, EDA specifies these projects in a NOFA, which also provides the appropriate point of contact and address.

(c) National technical assistance, research, training, and evaluation funds may not be used to start or expand a private business.

[64 FR 5427, Feb. 3, 1999. Redesignated at 64 FR 69878, Dec. 14, 1999]

§ 307.10 Application evaluation criteria.

EDA selects projects for national technical assistance, training, research or evaluation grant awards according to the general application evaluation criteria set forth in part 304 of this chapter and the extent, as appropriate, the project:

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(a) Does not depend upon further EDA or other Federal funding assistance to achieve results;

(b) Strengthens the capability of local, State, or national organizations and institutions, including nonprofit economic development groups, to undertake and promote effective economic development programs targeted to people and areas of distress;

(c) Benefits severely distressed areas;

(d) Helps to diversify distressed economies; and

(e) Demonstrates innovative approaches to stimulating economic development in distressed areas.

[64 FR 5427, Feb. 3, 1999. Redesignated at 64 FR 69878, Dec. 14, 1999]

§ 307.11 Award and grant rate requirements.

(a) EDA will provide assistance for the period of time required to complete the project scope of work. Normally, this does not exceed twelve months.

(b) If the project is regional or national in scope, EDA may determine that the requirement that public or private nonprofit organizations must act in cooperation with officials of a political subdivision of a State is satisfied by the nature of the project;

(c) Grant rate:

(1) The maximum Federal grant rate for a project under this subpart is:

(i) 50 percent, except as supplemented as provided in § 301.4(b); or

(ii) Up to and including 100 percent, if the project is not feasible without, and merits, a reduction or waiver of the non-Federal share required under the rate provided in § 301.4(b) of this chapter.

(2) A project is eligible for a supplemental grant increasing the Federal share up to and including 100 percent when the applicant is able to demonstrate that:

(i) The project is addressing major causes of distress in the area serviced and requires the unique characteristics of the applicant, which will not participate in the program if it must provide all or part of a 50 percent non-Federal share; or

(ii) The project is for the benefit of local, State, regional, or national economic development efforts, and will be

of no or only incidental benefit to the recipient.

[64 FR 5427, Feb. 3, 1999. Redesignated and amended at 64 FR 69878, Dec. 14, 1999]

§ 307.12 Post-approval requirements.

Financial reports, progress reports, and project products will be specified in the Special Award Conditions of the grant or cooperative agreement.

[64 FR 69879, Dec. 14, 1999]

PART 308—REQUIREMENTS FOR ECONOMIC ADJUSTMENT GRANTS

Sec.

308.1 Purpose and scope.

308.2 Criteria.

308.3 Use of Economic Adjustment grants.

308.4 Selection and evaluation factors.

308.5 Applicant requirements.

308.6 Post-approval requirements.

APPENDIX A TO PART 308—SECTION 209 ECONOMIC ADJUSTMENT PROGRAM REVOLVING LOAN FUND; PLAN GUIDELINES.

APPENDIX B TO PART 308—SECTION 209 ECONOMIC ADJUSTMENT PROGRAM REVOLVING LOAN FUND GRANTS; STANDARD TERMS AND CONDITIONS.

APPENDIX C TO PART 308—SECTION 209 ECONOMIC ADJUSTMENT PROGRAM REVOLVING LOAN FUND GRANTS; ADMINISTRATIVE MANUAL.

APPENDIX D TO PART 309—SECTION 209 ECONOMIC ADJUSTMENT PROGRAM REVOLVING LOAN FUND GRANTS; AUDIT GUIDELINES.

AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5429, Feb. 3, 1999, unless otherwise noted.

§ 308.1 Purpose and scope.

(a) The purpose of economic adjustment grants is to address the needs of communities experiencing adverse economic changes that may occur suddenly or over time, including but not limited to those caused by:

(1) Military base closures or realignments, defense contractor reductions in force, or Department of Energy defense-related funding reductions,

(2) Disasters or emergencies, in areas with respect to which a major disaster or emergency has been declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*),

(3) International trade,

(4) Fishery failures, in areas with respect to which a determination that there is a commercial fishery failure has been made under sec. 312(a) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(a)),

(5) Long-term economic deterioration, or

(6) Loss of a major community employer.

(b) Economic Adjustment grants are intended to enhance a distressed community's ability to compete economically by stimulating private investment in targeted economic sectors through use of tools that:

(1) Help organize and carry out a CEDS;

(2) Expand the capacity of public officials and economic development organizations to work effectively with businesses;

(3) Assist in overcoming major obstacles identified in the strategy;

(4) Enable communities to plan and coordinate: The use of Federal and other resources available to support economic recovery, development of regional economies, or recovery from natural or other disasters; and

(5) Encourage the development of innovative public/private approaches to economic restructuring and revitalization.

[64 FR 5429, Feb. 3, 1999, as amended at 64 FR 69879, Dec. 14, 1999]

§ 308.2 Criteria.

(a) A grant may be made under this part only when the project will help the area to meet a special need arising from actual or threatened severe unemployment or economic adjustment problems resulting from severe changes in economic conditions; and the area for which a project is to be carried out has a strategy and the project is consistent with the strategy, except that the strategy requirement shall not apply to planning projects.

(b) The term "special need" in paragraph (a) of this section means conditions of unemployment, per capita income, or special need that qualify an area for eligibility under § 301.2(b).

(c) Additional criteria, and/or priority consideration factors for assistance, may be set forth in a NOFA.

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§ 308.3 Use of Economic Adjustment grants.

(a) Grants may be used to pay for developing a strategy to alleviate long-term economic deterioration or a sudden and severe economic dislocation, or to pay for a project in implementation of such a strategy.

(1) Strategy grants may support developing, updating, or refining a strategy.

(2) Implementation grants support activities identified in an EDA-approved strategy. Specific activities may be funded as separate grants or as multiple elements of a single grant. Examples of implementation activities include:

(i) Infrastructure improvements, such as site acquisition, site preparation, construction, rehabilitation and/or equipping of facilities;

(ii) Provision of business or infrastructure financing through the funding of locally administered Revolving Loan Funds (RLFs), which may include interest rate buy downs;

(iii) Market or industry research and analysis;

(iv) Technical assistance, including organizational development such as business networking, restructuring or improving the delivery of business services, or feasibility studies;

(v) Public services;

(vi) Training (provided that it does not duplicate Department of Labor, Department of Education or other Federally-supported training programs), and

(vii) Other activities as justified by the strategy which meet statutory and regulatory requirements.

(b) Economic Adjustment grants may be spent directly by the grantee or redistributed to other entities.

(1) Redistribution in the form of grants may only be to eligible recipients of grants under part 308.

(2) Redistribution in the form of loans, loan guarantees, or equivalent assistance may be to public or private entities, including private for-profit entities.

(c) Revolving Loan Fund (RLF) applicants must submit an RLF Plan in accordance with this part and RLF guidelines, Appendix A of this part, displayed at EDA's web site, <http://www.doc.gov/eda>. A copy of the RLF

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guidelines is available from EDA and a copy will be furnished to an award recipient with the Offer of Financial Assistance.

§ 308.4 Selection and evaluation factors.

(a) Projects will be selected in accordance with part 304 of this chapter and the additional criteria as provided in subsections (b) and (c), as applicable.

(b) *Strategy grants.* EDA will review strategy grant applications for assurances that the proposed activities will conform to the CEDS requirements in § 303.3 of this chapter.

(1) Proper authority, mandate, and capacity of the applicant to lead and manage the planning process and strategy implementation;

(2) Representation of the public and private sectors in the development of the strategy's objectives. Representation may include: Public program and service providers, trade and business associations, educational and research institutions, community development corporations, minorities, labor, low-income, etc.; and

(3) The proposed scope of work for the strategy focuses on the structural economic problem(s) and includes provisions for undertaking appropriate research and analysis to support a realistic, market-based, adjustment strategy.

(c) *Implementation Grants.*

(1) EDA will review implementation grant applications for the extent to which,

(i) The strategy shows

(A) An understanding of the economic problems being addressed;

(B) An analysis of the economic sectors that constitute the community's economic base, including particular strengths and weaknesses that contribute to or detract from a community's current and potential economic competitiveness;

(C) Strategic objectives that focus on stimulating investment in new and/or existing economic activities that offer good prospects for revitalization and growth; and

(D) Identified resources and plans for coordinating such resources to implement the overall strategy; and

(ii) The proposed project is identified as a necessary element of or consistent with the strategy.

(2) *Revolving Loan Fund (RLF) Grants.* For applicants asking to capitalize or recapitalize an RLF, EDA will review the application for:

(i) The need for a new or expanded public financing tool to enhance other business assistance programs and services targeting economic sectors and/or locations described in the strategy;

(ii) The types of financing activities anticipated; and

(iii) The capacity of the RLF organization to manage lending, create networks between the business community and other financial providers, and contribute to the adjustment strategy.

(d) Additional criteria, or priority consideration factors for assistance, may be set forth in a NOFA.

[64 FR 5429, Feb. 3, 1999, as amended at 64 FR 69879, Dec. 14, 1999]

§ 308.5 Applicant requirements.

Each application for a grant under part 308 must:

(a) Include evidence of area and applicant eligibility (see part 301);

(b) Include, or incorporate by reference, if so approved by EDA, a strategy, as provided in § 301.3 of this chapter (except that a strategy is not required when a funding request is for planning assistance, *e.g.*, a strategy grant);

(c) Identify the sources of the other funds, both eligible Federal and non-Federal, that will make up the balance of the proposed project's financing, including any private sources of financing. The application must show that such other funds are committed to the project and will be available as needed. The local share must not be encumbered in any way that would preclude its use consistent with the requirements of the grant; and

(d) Explain how the proposed project meets the criteria of § 308.2.

[64 FR 5429, Feb. 3, 1999, as amended at 64 FR 69879, Dec. 14, 1999]

§ 308.6 Post-approval requirements.

(a) Financial, performance, and progress reports will be specified in the Special Award Conditions of the grant.

(b) Projects involving construction shall comply with the provisions of subpart B of part 305.

(c) RLF Supplemental Requirements and Guidelines—RLF grants are subject to the requirements set forth in this part and the publications: EDA's RLF Standard Terms, EDA's RLF Administrative Manual, and EDA's RLF Audit Guidelines, Appendixes B–D of this part displayed at EDA's web site, <http://www.doc.gov/eda>. A copy of these documents is available from EDA and a copy will be furnished to an award recipient with the Offer of Financial Assistance.

APPENDIX A TO PART 308—SECTION 209 ECONOMIC ADJUSTMENT PROGRAM REVOLVING LOAN FUND; PLAN GUIDELINES

OMB Approval No. 0610-0095.

Approval expires 07/31/99

BURDEN STATEMENT FOR REVOLVING LOAN FUND PLAN

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

The information is required to obtain or retain benefits from the Economic Development Administration pursuant to Economic Development Administration Reform Act, Public Law 105-393. No confidentiality for the information submitted is promised or provided except that which is exempt under 5 U.S.C. 552(b)(4) as confidential business information.

The public reporting burden for this collection is estimated to average 40 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Economic Development Administration, Herbert C. Hoover Building, Washington, DC, 20230, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

PURPOSE

EDA requires Revolving Loan Fund (RLF) grantees to manage their RLFs in accordance with a plan. The Plan must be approved by EDA prior to the grant award, but may be modified subsequently, with EDA approval, as provided for in the RLF Administrative Manual (Section X.D.). These guidelines are designed to assist grant applicants prepare and document an RLF Plan that (1) is tailored to supporting implementation of the area's Economic Adjustment Strategy, (2) provides for administrative clarity, continuity and consistency, and (3) is acceptable to EDA.

EDA EVALUATION CRITERIA

EDA will use the following criteria in evaluating RLF Plans:

1. The Plan flows from and is consistent with the Economic Adjustment Strategy for the area, as approved by EDA.
2. It is internally consistent, i.e., it is a coherent statement of the strategic purpose of the particular RLF and the various considerations influencing the selection of its financing strategy, policies and loan selection criteria.
3. The financing strategy demonstrates a knowledgeable analysis of the local capital market and the financing needs of the targeted businesses.
4. The financing policies and portfolio standards are consistent with EDA policy and requirements.
5. The strategic objectives defined are sufficiently meaningful, though not necessarily quantified, so that progress toward them can be assessed over time.
6. The administrative procedures for operating the RLF are consistent with generally accepted prudent lending practices for public lending institutions.

FORMAT AND CONTENT

The format for the Plan provides for two distinct parts: the Revolving Loan Fund Strategy and the Operational Procedures. Each part contains a number of sections designed to facilitate the orderly and logical presentation of the required information. However, the organization of the material and the level of detail provided in the subsections of Part I may be varied to improve the narrative flow, provided the substantive content is adequately covered.

The title page of the Plan document should show the grant recipient organization's name and the date the Plan was approved. Normally, approval is required to be by resolution of the organization's governing board. States are exempted from this requirement.

PART I: THE REVOLVING LOAN FUND STRATEGY

The RLF strategy is the approach selected by the grant recipient organization for using RLF financing as part of the broader business development strategy designed to support achievement of the goals and objectives established through the area/community's economic adjustment or development planning process. The sequence of the subsections of this Part are designed to lead the reader from the general to the more specific, providing the reader with an understanding of how the RLF strategy was arrived at, and establishing the strategic, organizational and programmatic context for the proposed use of the RLF.

A. Economic Adjustment Program Overview

A short description of the area's economic adjustment program, i.e., the strategy and the full range of activities planned and being implemented, should be provided. The following topics must be included:

1. The nature and scale of the economic adjustment problem(s) underlying the economic distress statistics that resulted in the area becoming eligible for Section 209 assistance.
2. The process through which the Economic Adjustment Strategy was developed. Was it an outgrowth of an ongoing economic development program, such as the Overall Economic Development Program (OEDP) required for other forms of EDA assistance, or a special initiative undertaken in-house or by a consultant? What community organizations and interest groups were, and continue to be, involved in further refining the strategy and overseeing its implementation?
3. Area resources/assets (potential or actual growth industries, industries that could be more productive, work force skills, natural resources, etc.) on which the strategy is designed to build. What specific opportunities have been identified for expanding or strengthening existing economic activities and/or creating new activities?
4. The strategic adjustment goals and objectives derived from the conclusions described above and an assessment of the capacity of the community to invest in pursuing the opportunities identified.
5. The implementation programs and activities, both underway and planned, that support the strategic objectives. Note that while business development activities should be identified here, in addition to other activities, Section B requires a detailed discussion of the business development strategy.
6. The organizational structure and distribution of responsibility for managing the on-going adjustment program. What agency

is responsible for maintaining the adjustment strategy, evaluating results and updating it as needed? What agencies/organizations manage or coordinate implementation of key elements in the overall strategy, in particular, the business development strategy of which the RLF is to be a component.

B. The Business Development Strategy

As emphasized in EDA's guidelines for preparing an Economic Adjustment Strategy, a key element of any community's adjustment program should be its business development strategy. A community's business development strategy will depend on the particular opportunities identified for stimulating business investment and productivity. Participation of the business community in the development of the strategy is essential, as is a firsthand knowledge of the characteristics of firms within the targetted economic sectors and their individual needs for assistance.

It is the experience of working with the business sector in designing and implementing a business development strategy that enables the community to (1) determine the need for an RLF, and (2) define the types of RLF investments that will be most effective in complementing other types of business assistance in supporting the objectives of the adjustment program.

If the business development strategy is already well documented in the community's Economic Adjustment Strategy, it need only be summarized sufficiently to provide a bridge between the adjustment strategy and the RLF financing strategy. If not well documented, it should be described in more detail. The following features of the strategy should be addressed:

1. The objectives of the business development strategy, for example, increase the capacity of local firms to supply parts and services to a major local manufacturer, encourage creation of firms to develop and commercialize products that add value to a local resource, assist small manufacturing firms incorporate new production technologies and/or develop new markets, etc.
2. The pertinent characteristics of the businesses or prospective businesses in the economic sectors targeted by the strategy; for example, their size, age, ownership, management, products, markets, competitiveness, production processes, capital, etc.
3. The types of assistance needed by these businesses and would-be entrepreneurs to take advantage of the opportunities identified; for example, access to technical information (market data, new technologies and production processes, exporting), hands-on management and technical assistance, financing, incubator space, etc. How were and are these needs being identified: surveys, on-site interviews, business forums, etc.?
4. The programs/activities being undertaken by the public sector and/or develop-

ment organizations to address the identified needs. Are there other sources of assistance available; for example, a technical college, business development center, industrial extension service, SCORE program, an SBA Small Business Development Center and/or a Certified Development Corporation, etc.? Are there private sector organizations, industry and/or business associations that promote information exchange and technical support?

C. The Financing Strategy

The community's financing strategy should take into account all the sources of financing, public and private, available to support its business development objectives, and should identify the best and appropriate sources to meet the differing creditworthiness and needs of the types of businesses targeted for investment. Analysis of the characteristics of the demand for and supply of financing will determine the appropriate financing niche for the RLF. This should be discussed in terms of the following:

1. The current types of financing needs and opportunities in the targeted business sectors and specific types of firms within them. What further needs and opportunities are expected to emerge as implementation of the strategy progresses?
2. The current availability of public and private financing in the area. What are the prevailing commercial lending policies/restrictions? What role is anticipated for the public and private lenders in supporting the community's business development strategy?
3. The characteristics of the financing niche that the RLF would occupy.
 - a. Types of businesses/firms?
 - b. Types of financing?
 - c. Types of terms?
4. The impact RLF financing is anticipated to have on accomplishing the community's economic adjustment objectives in the next 3-5 years. For example, with respect to:
 - a. Restructuring/strengthening the local economy.
 - b. Stimulating private investment, both through leveraging commercial financing and "showing the way to other investors."
 - c. Enhancing job opportunities.

D. Financing Policies

Consistent with the role identified for the RLF in the community's financing strategy, and with due consideration for the need to manage and protect the RLF capital, the specific policies designed to govern RLF financing should be discussed as follows:

1. The standard lending terms, and any concessionary or special financing techniques that the RLF will entertain to accomplish the objectives of the business development strategy. Discuss the key factors that will determine how such techniques might be employed.

a. The range of allowable interest rates the RLF will charge borrowers.

b. Requirements for equity or cash injections to be provided by the RLF borrower.

(1) Will the policy be the same for new as opposed to established businesses?

(2) Will any deviations be allowed, e.g., for working capital loans?

c. The standard repayment terms for both working capital and fixed asset loans, and any deviations.

(1) If the RLF anticipates moratoria on principal payments, specify the maximum moratorium period.

(2) What key factors will determine when any deviations will be employed?

2. The types of collateral to be required of borrowers.

3. The minimum and maximum loan sizes that the RLF will entertain.

E. Portfolio Standards and Targets

RLF portfolio standards and targets are used by EDA as surrogate measures for the economic performance of an RLF. They should be established as follows:

1. The anticipated percentage of RLF investments in each of the following:

a. Industrial/commercial/Service businesses (Show any subcomponents, if significant and if identified in the business development strategy.)

b. New businesses/expansion/retention

2. The anticipated percentage of the RLF portfolio that will be targeted towards working capital loans and fixed asset loans (note that EDA allows a maximum of 50 percent for working capital loans during the grant disbursement phase of the RLF)

3. Private investment leveraging ratio for the portfolio overall. Sources of private investment that may be included are: financing from other lenders (e.g., banks, investment companies, etc.) or private investment on the part of the borrower or other firms in conjunction with the RLF financing.

4. Cost per job for the portfolio overall.

F. RLF Loan Selection Criteria

In addition to the required selection criterion that financing is not otherwise available, what “economic impact” criteria will be used to evaluate proposed loans?

G. Performance Assessment Process

Describe the process and factors that the grant recipient will use (1) to periodically assess the performance of the RLF in accomplishing its stated economic adjustment objectives, and (2) to modify the RLF Plan as needed.

PART II: REVOLVING LOAN FUND OPERATIONAL PROCEDURES

This part of the RLF Plan is designed to cover in detail the specific operational pro-

cedures to be followed by the grant applicant/recipient in administering the RLF.

Section A requires an overview of the organizational distribution of responsibility for the key elements in operating the RLF. Sections B. through E. require, for each item indicated, a short description of (1) how it will be addressed, the procedure/requirement to be used, if any, (2) the documentation that will be used, (3) the party(ies) responsible for carrying out the requirement, and (4) the time frame within which it is to be implemented.

A. Organizational Structure

1. Provide an overview of the organizational structure within which the RLF will be operated. For each of the functions critical to the conduct of the RLF’s lending activities, identify the responsible parties including any from outside the organization. Use a schematic diagram if helpful.

Critical operational functions include: identification and development of appropriate financing opportunities; provision of business assistance and advisory services to prospective and actual borrowers (identify the types and sources of services available); environmental reviews; and loan management (loan processing, credit analysis, loan write-ups and recommendations, closings, collections and servicing, handling defaulted loans and foreclosures, and compliance with grant requirements). Note that a more detailed description of how some of these functions will be handled is requested in sections below.

2. Describe the size and general composition of the organization’s RLF loan board; include experience and occupational requirements. Describe its duties and responsibilities, membership terms and quorum requirements.

An RLF loan board must be responsible for approving loans, all major loan modifications (or waivers), and loan foreclosure actions. It must also be responsible for at least recommending RLF loan policy (actual approval of loan policy may take place at a higher level). The loan board should include members with business experience (representation of targeted industries and/or business sectors is desirable provided it will not cause a conflict of interest), members with financing experience, members from both the public and private sectors and minority members representative of the community. At least one member with financing experience (similar to the type of loans to be made under the RLF program) must be present for each loan decision.

B. Loan Processing Procedures

1. Standard Loan Application Requirements—include a list of items or a checklist showing the items to be required of RLF

loan applicants. [It is acknowledged that not all items will apply to each loan applicant and that certain situations may require additional items not on the list.]

2. Credit Reports.
3. Appraisal Reports.
4. Environmental Reviews.
5. Standard Collateral Requirements—include requirements for personal guarantees and insurance (hazard, keyman life, flood, and title).
6. Standard Equity Requirements—when listing equity requirements, differentiate between existing and new companies, and fixed asset and working capital loans. Note that an allowable requirement for a working capital loan may simply require a borrower to have a certain net working capital position. Equity is defined as an amount or percentage of capital (or lien free assets) that is required to be added to a project from borrower or investor sources.
7. Loan Write-up—indicate the items to be addressed in the RLF loan write-up. At a minimum, a loan write-up must discuss how the proposed RLF loan is not replacing private lender funding sources—refer to Section IV.B.3. of the RLF Administrative Manual. Other items should include a summary of the firm's history, management, product, production capability, market conditions, financing, collateral, repayment ability, consistency with the RLF's financing policy and whether there are any environmental problems associated with the project. A Loan Write-up summarizes the key aspects of a loan; it is prepared by the RLF grant recipient and is usually provided to the RLF loan board prior to the loan decision.
8. Procedures for loan approvals, documentation of loan board decisions, and notification of borrowers.

C. Loan Closing and Disbursement Procedures

1. General Closing Requirements—include documentation required to confirm any needed equity injection and private lender financing.
2. Loan Closing Documentation Requirements—provide a checklist of the standard documents that will be required for the types of loans to be made under the RLF. Indicate any special timing requirements, e.g., Uniform Commercial Code (UCC) searches prior to and/or subsequent to a UCC filing on personal property.
3. Loan Disbursement Requirements—indicate borrower requirements for drawing loan funds, i.e., is a borrower required to provide any evidence (e.g., an invoice) that it has ordered an asset prior to receiving loan funds to ensure that funds are ordered only when actually needed and that they will be used as agreed in the loan agreement, any pre-disbursement requirements for working capital loans, any special requirements for construction financing, and any other disbursement

procedures that are necessary to protect RLF assets.

D. Loan Servicing Procedures

1. Loan Payment and Collection Procedures—indicate the standard method(s) of loan payment by RLF borrowers, e.g., payment coupon books, automatic payment withdrawals, or other methods. Indicate any procedures for protection and timely deposit of RLF loan payments. Note that unused RLF funds must be Federally insured if deposited in a financial institution.
2. Loan Monitoring Procedures—indicate the standard procedures for monitoring loan conditions, including requirements/procedures for financial statements, annual insurance renewals, UCC refilings, borrower site visits, tickler files, and compliance with any Federal requirements of the grant.
3. Late Payment Follow-up Procedures—indicate the standard procedures for handling loans that are in arrears up to 90 days and discuss any late penalty requirements (which should be stated in the note).
4. Procedures for Handling Loans over 90 days in arrears.
5. Write-off Procedures—indicate how the RLF will account for loan write-offs.

E. Administrative Procedures

1. Procedures for Loan Files and Loan Closing Documentation—indicate what should be included in an RLF loan file, e.g., the application, loan commitment letters, copy of private lender loan agreement, financial statements, annual insurance certifications, annual site visit reports, general correspondence, job reports, etc. Indicate any procedures for safekeeping loan documents, particularly the loan closing documents. At a minimum, all original notes, loan agreements, personal guarantees and security agreements should be placed in a fire-proof facility or container.
2. Procedures for Complying with EDA Reporting Requirements—provide an overview of how RLF loan payments and RLF Income sources will be tracked and accounted for in order to meet EDA reporting requirements. [RLF Income sources including interest from loans and from accounts holding idle RLF funds, loan fees, late payment fees, and any other sources of RLF revenue.]
3. Grantee control procedures for ensuring compliance with all grant requirements and for monitoring the RLF portfolio.

Prior to the initial grant disbursement, the grant recipient must also certify that the basic loan documents are in place and that these documents have been reviewed by counsel for adequacy to protect the interests of the RLF. The minimum documents required are:

- Note
- Loan Agreement

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- Security Agreement(s)
- Deed of trust or Mortgage
- Agreement of Prior Lienholder

**APPENDIX B TO PART 308—SECTION 209
ECONOMIC ADJUSTMENT PROGRAM
REVOLVING LOAN FUND GRANTS;
STANDARD TERMS AND CONDITIONS**

Approval expires 07/31/99.

**BURDEN STATEMENT FOR REVOLVING
LOAN FUND STANDARD TERMS AND
CONDITIONS**

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

The information is required to obtain or retain benefits from the Economic Development Administration pursuant to Economic Development Administration Reform Act, Public Law 105-393. No confidentiality for the information submitted is promised or provided except that which is exempt under 5 U.S.C. 552(b)(4) as confidential business information.

The public reporting burden for this collection is estimated to average 12 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Economic Development Administration, Herbert C. Hoover Building, Washington, DC, 20230, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

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A. PROGRAM STATEMENT

These Standard Terms and Conditions apply to all Economic Adjustment Program awards for revolving loan fund activities funded under Section 209 of the Public Works and Economic Development Act of 1965, P.L. 89-136, as amended (42 U.S.C. 3121, *et seq.*).

For the purpose of these Standard Terms and Conditions, (a) the term "Government" refers to the Economic Development Administration (EDA); (b) the term "Recipient" refers to the undersigned recipient of Government funds under the Agreement to which this attachment is made a part; (c) the term "Department" refers to the Department of Commerce; (d) the term "Regional Office" refers to the appropriate Regional Office of the Economic Development Administration; (e) the term "Federal Program Officer" refers to the Regional Director of the appropriate EDA Regional Office (the Federal Program Officer is responsible for programmatic and technical aspects of this award); (f) the term "Grants Officer" refers to the Assistant Secretary for Economic Development or his or her designated representative (the Grants Officer is responsible for all administrative aspects of this award and is authorized to award, amend, suspend, and terminate financial assistance awards); (g) the term "Project" refers to the activity for which the Government grant was awarded; and (h) "RLF" refers to this revolving loan fund grant project.

B. OVERALL STATUTORY AND EXECUTIVE ORDER REQUIREMENTS

Some of the terms and conditions herein contain, by reference or substance, a summary of the pertinent statutes or regulations issued by a Federal agency and published in the Code of Federal Regulations. To the extent that it is a summary, such term or condition is not in derogation of, or an amendment to, the statute or regulation.

The Recipient shall comply, and require any contractor which provides services on behalf of the Recipient to comply with all applicable Federal, state, territorial, and local laws, in particular, the following Federal public laws, the regulations issued thereunder, Executive Orders and OMB Circulars, and the requirements listed in Section D. herein:

.01 *EDA Statute and Regulations:* Applicable provisions of the Public Works and Economic Development Act of 1965, P.L. 89-136, as amended (42 U.S.C. 3121, *et seq.*) and regulations in 13 CFR, Chapter III.

.02 *Administrative Requirements:* Administrative requirements for grants, OMB Circular No. A-110, "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations," and its attachments, as amended or as superseded in the Department's regulations, or those found in 15 CFR Part 24, "Uniform Administrative Requirements For Grants and Cooperative Agreements to State and Local Governments," as applicable. In the event of inconsistency or conflict between the administrative requirements and EDA's enabling legislation or regulations, the latter shall prevail;

.03 *Civil Rights Requirements:* Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d-2000d-4); 15 CFR Part 8; Executive Orders 11246 and 11375; 41 CFR Part 60-4; P.L. 92-65, Section 112, prohibiting sex discrimination on programs under the Public Works and Economic Development Act; 13 CFR Part 317 imposing civil rights requirements on recipients; regulations issued pursuant to the Age Discrimination Act of 1965 (42 U.S.C. 6101 *et seq.*) 15 CFR Part 20; Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and the implementing regulations of the Department of Commerce in 15 CFR 8b, prohibiting discrimination against and providing fair and equitable treatment of the handicapped under programs or activities receiving Federal financial assistance; and such other civil rights legislation, regulations, and Executive Orders as applicable;

.04 *Hatch Act:* Recipient will comply with the provisions of the Hatch Act (5 U.S.C. Section 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment is funded in whole or in part with Federal funds.

C. GENERAL REQUIREMENTS

.01 *Grant Terms and Conditions:* The Recipient and any consultant/contractor providing services on behalf of the Recipient shall comply with the Grant Award and all terms and conditions thereto. The decision of the Government in interpreting the terms and conditions of this grant shall be final.

.02 *Compliance with EDA Instructions:* The Recipient shall comply with EDA Revolving Loan Fund guidelines, manuals and other instructions as may be issued from time to time by the Government in connection with the assistance herein offered. All such instructions are to be applied on the effective date of the award.

.03 *Exclusion from Certification and Disclosure requirements:* An Indian tribe or organization that is seeking an exclusion from Certification and Disclosure requirements must provide (preferably in an attorney's opinion) the Government with the citation of the provision or provisions of Federal law upon which it relies to conduct lobbying activities

that would otherwise be subject to the prohibitions in and to the Certification and Disclosure requirements of Section 319 of Public Law No. 101–121.

.04 Duplication of Work: The purpose and scope of work for which this award is made shall not duplicate programs for which monies have been received, committed, or applied for from other sources, public or private. The Recipient shall submit full information about related programs that may be initiated within the award period. The Recipient shall immediately provide written notification to the Federal Program Officer in the event that other Federal financial assistance is received during the award period relative to the scope of work of this award.

.05 Reimbursement of Costs Prior to Award: Funds provided under this award shall not be used to pay for the cost of any work started or completed prior to the effective date of this award.

.06 Other Funding Sources: Federal-share funds budgeted or awarded for this Project shall not be used to replace any financial support previously provided or assured from any other source. The Recipient agrees that the general level of expenditure by the Recipient for the benefit of program area and/or program designated in the Special Terms and Conditions of this award, or any amendment or modification thereto, shall be maintained and not reduced as a result of the Federal-share funds received under this Project.

.07 Availability of Information: The Recipient agrees that all information resulting from its activities and not exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 522, shall be made freely available to the public. This requirement is exclusive to the Recipient and is not applicable to confidential information disclosed or obtained in the normal borrower/lender relationship.

.08 Procurement Standards & Use of Consultants/Contractors: The procurement standards and procedures set forth in 15 CFR Part 24, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," Section 24.36 or OMB Circular No. A–110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations," Attachment O or its implementing Department regulation, as appropriate, shall apply to all awards. For all proposals and contracts where costs are expected to exceed the simplified acquisition threshold, the scope of work (request for proposal) and the cost of such must be submitted to and approved by the Government prior to employment of such consultants or contractors. The Recipient shall ensure that any consultant or contractor paid from funds provided under this award either directly or

through program income is bound by all applicable award terms and conditions. The Government shall not be liable hereunder to a third party nor to any party other than the Recipient.

.09 Program Performance Notification: The Recipient shall inform the Government as soon as the following types of conditions become known:

a. Problems, delays, or adverse conditions that materially affect the ability to attain program objectives, prevent the meeting of time schedules or goals, or preclude the attainment of project work units by established time periods. This disclosure shall be accompanied by a statement of the action taken, or contemplated, and any EDA assistance needed to resolve the situation.

b. Favorable developments or events that enable meeting time schedules and goals sooner than anticipated or producing more work units than originally projected.

.10 Attorney and Consultant Fees: The Recipient hereby agrees that no funds made available from this grant shall be used, directly or indirectly, for paying attorneys' or consultants' fees in connection with securing this grant or other grants or cooperative agreements from EDA.

.11 Suspension and Termination of Grant:

a. When a Recipient has failed to comply with the grant award stipulations, standards, or conditions, EDA may, on reasonable notice to the Recipient, suspend the grant and withhold further payments, or prohibit the Recipient from incurring additional obligations of grant funds, pending corrective action by the Recipient or a decision to terminate in accordance with the following paragraphs. EDA shall allow all necessary and proper costs which the Grantee could not reasonably avoid during the period of suspension, provided they meet the provisions of applicable OMB cost principles and the grant terms and conditions.

b. Whenever the Recipient shall fail in its fiduciary responsibilities, or shall be unable or unwilling to perform, as trustee of this grant to serve the purpose of the Economic Adjustment program for which it was made, EDA may suspend, terminate or transfer this grant to an eligible successor Recipient, with jurisdiction over the Project area, to administer it as such trustee. The Recipient shall cooperate with EDA in accomplishing the transfer of this grant to such successor Recipient.

c. EDA may terminate any grant in whole, or in part, at any time before the date of completion, whenever it is determined that the Recipient has failed to comply with the conditions of the grant (termination for cause). EDA shall promptly notify the Recipient in writing of the determination and the reasons for the termination, together with the effective date. Payments made to

recipients or recoveries by the Federal sponsoring agencies under grants or other agreements terminated for cause shall be in accordance with the legal rights and liabilities of the parties. Whenever EDA terminates any RLF grant for cause, in whole or in part, it has the right to recover residual funds and assets of the RLF grant in accordance with the legal rights of the parties.

d. In accordance with subsections (a) (b) and (c) above, EDA may suspend or terminate any grant for cause based on, but not limited to, the following: (1) failure to make loans in accordance with the RLF Plan, including the time-schedule for loan closings; (2) failure to obtain prior EDA approval for such changes to the RLF Plan, including provisions for administering the RLF, as specified in the RLF Administrative Manual, as amended; (3) failure to submit progress, financial or audit reports as required by the terms and conditions of the grant agreement; (4) failure to comply with prohibitions against conflict-of-interest for any transactions involving the use of RLF funds; (5) failure to operate the RLF in accordance with the RLF Plan and the terms and conditions of the grant agreement.

e. EDA or the Recipient may terminate this grant in whole or, in part, when the parties agree that the continuation of the project would not produce beneficial results commensurate with the further expenditure of funds (termination for convenience). The parties shall agree upon the termination conditions, including the effective date and, in the case of partial terminations, the portion to be terminated. The Recipient shall cancel as many outstanding obligations as possible. EDA shall allow full credit to the Recipient for the Federal share of the noncancelable obligations, properly incurred by the Recipient prior to termination.

f. If there is a partial termination of the EDA grant, the full amount of the original nonfederal matching share is expected to be retained in the RLF for lending purposes unless otherwise provided for in the grant agreement or agreed to in writing by the Government.

g. Other grant closeout procedures set forth in 15 CFR, Part 24, or OMB Circular No. A-110, or its implementing Department regulation, as applicable, shall also apply.

D. RLF REQUIREMENTS FOR RECIPIENTS AND BORROWERS

.01 Prudent Lending Practices: The Recipient agrees to administer the RLF in accordance with lending practices generally accepted as prudent for public loan programs. Such practices cover loan processing, documentation, loan approval, collections, servicing, administrative procedures and recovery actions. The Recipient agrees to follow local laws and filing requirements to perfect and

maintain security interests in RLF collateral.

.02 Inclusion of requirements in RLF Loan Documents: The Recipient agrees to incorporate applicable Federal requirements described herein in RLF loan agreements to ensure borrower compliance.

.03 Annual RLF Plan Certifications: The Recipient agrees to certify annually to the Government that the RLF is being operated in accordance with the RLF Plan (as referenced in the Special Terms and Conditions of the grant, as amended); and that the RLF Plan is consistent with, and supports, implementation of the current Economic Adjustment Strategy for the project area.

.04 RLF Plan Modifications: The Recipient agrees, because economic conditions change and new approaches to stimulating economic adjustment may be needed, to seek EDA approval of such modifications to the RLF Plan as may be required for the RLF to continue to be fully supportive of the area's Economic Adjustment Strategy, as updated and approved by EDA. The Recipient further agrees to request EDA approval of modifications to the Plan at any time there is evidence that such modifications are needed to ensure effective use of the RLF as a strategic financing tool.

.05 Eligible Area: The Recipient shall use the RLF only in the areas eligible for Section 209 assistance as approved by the Government and defined in the Special Terms and Conditions of the grant. To add a new eligible area to a previously awarded RLF grant, the Recipient shall obtain the prior written approval of the Government. To ensure that the economic benefits of RLF loans remain within eligible lending areas, the Recipient shall include a *provision* in RLF loan documents to call loans if the economic activity financed is moved outside the eligible lending area.

.06 Relocation: The Recipient agrees that RLF funds shall not be used to relocate jobs from one commuting area to another. The Recipient shall include a *provision* in RLF loan documents to call loans if it is determined that (a) the business used the RLF loan to relocate jobs from another commuting area or (b) the economic activity financed is moved to another commuting area to the detriment of local workers.

.07 Grant Disbursement Schedule: The Recipient agrees, unless otherwise specified in the Special Terms and Conditions of the grant award, to make loans in the initial round of lending at a rate such that no less than 50 percent of the grant funds are disbursed within 18 months, 80 percent within two years and 100 percent within three years of the date of the grant award. The Recipient acknowledges that if it fails to meet any of these disbursement deadlines, the Government will not disburse additional grant funds unless (1) the funds are required to

close loans approved prior to the deadline and which will be fully disbursed to the borrower(s) within 45 days, or (2) the funds are required to meet continuing disbursement obligations on loans closed prior to the deadline, or (3) the Government has approved in writing an extension of the deadline. In no event, will the time permitted for full disbursement of the grant funds extend beyond September 30, of the fifth year after the fiscal year of the grant award. Funds not disbursed in accordance with the foregoing will automatically be retained by the Federal Government.

.08 Capital Utilization Standard: Subsequent to full disbursement of the grant funds, the Recipient agrees to manage its repayment and lending activities to maintain 75 percent or more of the RLF capital loaned out or committed at all times, unless a different standard has been agreed to in writing by the Government. The Recipient agrees to comply with Government sanctions if the applicable capital utilization standard is not met within a reasonable time period.

.09 Civil Rights: The Recipient agrees that RLF funds will be made available on a non-discriminatory basis and that no applicant will be denied a loan on the basis of race, color, national origin, religion, age, handicap, or sex. The Recipient agrees to market the RLF program to prospective minority and women borrowers. The Recipient shall include a *provision* in the RLF loan documents that prohibits borrowers from discriminating against employees or applicants for employment or providers of goods and services. The Recipient agrees to monitor borrower compliance with civil rights laws.

.10 Environment: The Recipient shall develop and implement an environmental review process in accordance with the intent of the National Environmental Policy Act of 1969, as amended (P.L. 91-190), as implemented by the "Regulations" of the President's Council on Environmental Quality (40 CFR Parts 1500-1508).

In addition, the Recipient shall indemnify and hold the Government harmless from and against all liabilities that the Government may incur as a result of providing an award to assist, directly or indirectly, in the preparation of site(s) or construction, renovation or repair of any facility or site(s), if applicable, to the extent that such liabilities are incurred because of ground water, surface, soil or other conditions caused by operations of the Recipient or any of its predecessors on the property;

The Recipient shall adopt procedures to review the impacts of prospective loan proposals on the physical environment. The RLF Plan shall provide for disapproval of any loan project which would adversely (without mitigation) impact flood plains, wetlands, significant historic or archeological properties, drinking water resources,

or nonrenewable natural resources. In administering the RLF, the Recipient shall adopt procedures to comply with applicable laws and statutes including, but not limited to, the following:

a. The Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*);

b. The Federal Water Pollution Control Act, as amended (33 U.S.C. 1251, *et seq.*);

c. The Coastal Zone Management Act of 1972, P.L. 92-583, as amended (16 U.S.C. 1451, *et seq.*);

d. Executive Order 11988, Floodplain Management (May 24, 1977), and regulations and guidelines issued thereunder by the Economic Development Administration;

e. Executive Order 11990, Protection of Wetlands (May 24, 1977);

f. The Endangered Species Act of 1973 P.L. 93-205, as amended (16 U.S.C.1531, *et seq.*);

g. The Safe Drinking Water Act, P.L. 93-523, as amended (42 U.S.C. 300f-300j-9);

h. The Wild and Scenic Rivers Act, as amended (16 U.S.C. 1271, *et seq.*);

i. The Resource Conservation and Recovery Act of 1976, P.L. 94-580, as amended (42 U.S.C. 6901);

j. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), P.L. 96-510, as amended, by Superfund Amendments and Reauthorization Act of 1986 (SARA) (42 U.S.C. 9601, *et seq.*) [As deemed necessary, the Recipient shall require compliance with EDA policy and procedures regarding the identification of hazardous and toxic waste on real property affected by RLF activities in accordance with EDA Directive 17.01, promulgated to reduce liabilities for environmental cleanup under CERCLA and SARA. This will require a certification to demonstrate a "due diligence" examination of project site(s) and for any environmental contamination that may affect real property for which EDA might be placed in the chain of title, or that is affected by EDA assisted construction activities.];

k. The National Historic Preservation Act P.L. 89-665 (16 U.S.C. 470, *et seq.*), (36 CFR Part 800);

l. Coastal Barriers Resources Act P.L. 97-348 (16 U.S.C. 3501, *et seq.*); and

m. All state and local environmental review requirements with all applicable Federal, state and local standards. The Recipient shall ensure that potential borrowers' environmental submittal is reviewed. Should a proposed RLF project require the preparation of an Environmental Assessment (EA) or an Environmental Impact Statement/Report (EIS/EIR) in response to Federal, state or local requirements, the Recipient shall be responsible for ensuring compliance with the requirement prior to providing any loan assistance under the RLF.

.11 Earthquake Requirements: For use in new building construction projects: The Recipient is aware of and intends to comply

with one of three model Codes outlined by the Committee on Seismic Safety in Construction (ICSSC): 1991 ICBO Uniform Building Code; 1992 Supplement to the BUCA National Building Code; or 1991 Amendments to the SBCC Standard Building Code.

.12 Flood Hazard Insurance: Where applicable, the Recipient shall require RLF borrowers to obtain flood hazard insurance pursuant to the Flood Disaster Protection Act of 1973, P.L. 93-234, as amended (42 U.S.C. 4002, *et seq.*);

.13 Davis-Bacon: The Recipient shall require borrowers to comply with the Davis-Bacon Act, as amended [40 U.S.C. 276a-276a-5); 42 U.S.C. 3222], when construction is financed in whole or in part by the RLF and when any related construction contract exceeds \$2,000.

.14 Contract Work Hours and Safety Standards Act & Anti-Kickback Act: The Recipient shall require borrowers to comply, where applicable, with the Contract Work Hours and Safety Standards Act, as amended (40 U.S.C. 327-333) and with the Anti-Kickback Act, as amended (40 U.S.C. 276(c); 18 U.S.C. 874);

.15 Access for the Handicapped: The Recipient shall ensure that if the RLF is used in whole or in part to finance a building or facility intended for use by the public or for the employment of physically handicapped, it must be accessible to the physically handicapped, pursuant to Public Law 90-480, as amended (42 U.S.C. 4151, *et seq.*), and the regulations issued thereunder;

.16 Conflict of Interest:

a. The Recipient shall not make RLF funds available to a business entity if the owner of such entity or any owner of an interest in such entity is related by blood, marriage, law or business arrangement to the Recipient or an employee of the Recipient or any member of the Recipient's Board of Directors, or a member of any other Board (hereinafter referred to as "other Board") which advises, approves, recommends or otherwise participates in decisions concerning loans or the use of grant funds.

b. No officer, employee, or member of the Recipient's Board of Directors, or other Board, or person related to the officer, employee, or member of the Board by blood, marriage, law, or business arrangement shall receive any benefits resulting from the use of loan or grant funds, unless the officer, employee, or Board member affected first discloses to the Recipient on the public record the proposed or potential benefit and receives the Recipient's written determination that the benefit involved is not so substantial as to affect the integrity of the Recipient's decision process and of the services of the officer, employee or board member.

c. An officer, employee or board member of the Recipient shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment or any other thing of mone-

tary value, for himself or for another person, from any person or organization seeking to obtain a loan or any portion of the grant funds.

d. Former board members and/or officers are ineligible to apply for or receive loan or grant funds for a period of one year from the date of termination of his/her services.

E. FINANCIAL REQUIREMENTS

.01 Budget: The line item budget for this award is found in the budget summary of the grant award. Funds budgeted under the RLF portion of a grant shall be used for loan projects and, if specified, for audit costs related to the RLF, but shall not be used for other administrative costs related to the RLF.

.02 Method of Payment: Payments will be made by the Automated Clearing House Electronic Funds Transfer (ACH/EFT) System which transfers funds directly to a Recipient's bank account without regard to dollar amount. Initially, the Recipient must complete the Payment Information Form ACH Vendor Payment System (SF 3881) and return it to the EDA Regional Office. The award number must be included on the first line of the COMPANY INFORMATION section. The SF 3881 should first be forwarded to the Recipient's bank so that the bank can fill in the FINANCIAL INSTITUTION INFORMATION section before returning the SF 3881 to the EDA Regional Office.

The completed SF 3881 shall be submitted together with the completed Request for Advance or Reimbursement (SF 270), to the EDA Regional Office. Subsequently, only a completed SF 270 is necessary to request a transfer of funds unless information on the original SF 3881 has changed. *Note:* When completing SF 270 for an ACH/EFT transfer of funds, *type* "ACH/EFT" in Item No. 10 of the form to indicate a transfer of funds through the Automated Clearing House Electronic Funds Transfer System.

.03 Request For Budget Change: Request for budget changes must be submitted to the Federal Program Officer for approval. However, a budget change involving a reduction in the line item for audit costs for an equal increase in the RLF capital requires only written notification to the Government to be effective.

.04 Matching and Cost Sharing: a. Local Share: In affirming this award, the Recipient certifies that the non-Federal share of project costs is committed and is available as needed for the project, that the non-Federal share is from sources which can be used as match for the EDA project and that the non-Federal share is not encumbered or otherwise conditional.

b. To the extent applicable to this award, cash contributions by the Recipient are expected to be paid out at the same general rate as the Federal share, but in no event

shall the Federal share be paid out at a faster rate than the Recipient's contribution. Any exceptions must be approved in writing by the Grants Officer based on sufficient documentation demonstrating previously determined plans for or later commitment of cash contributions.

c. The approved budget for this award is predicated normally upon a sharing of allowable costs. In the event allowable costs are less than the approved budget, the Federal share of this award will be limited to the Federal pro-rata share of the total allowable costs not to exceed the total Federal dollar amount reflected on the award document. However, consistent with Section C.11.f, the full amount of the nonfederal matching share will be expected to remain for use in the RLF unless otherwise provided for.

.05 *Program Income*: Program Income includes repayments of RLF loan principal and RLF Income (defined in Section E.06 below). Program Income, with the *exception* of current RLF Income, may be used only for re-lending and must be used by the Recipient (1) prior to requesting a disbursement of EDA grant funds, or (2) concurrently with the proceeds of such a disbursement.

.06 *RLF Income*: RLF Income is defined as interest earned on outstanding loan principal, interest earned on accounts holding RLF funds not needed for immediate lending, all loan fees and loan-related charges received from RLF borrowers, and other income generated from RLF operations. The Recipient may use RLF Income only to capitalize the RLF and/or to cover eligible and reasonable costs necessary to administer the RLF, unless otherwise provided for in the Special Terms and Conditions of the grant.

If RLF Income will be used to pay for RLF administrative expenses, the Recipient agrees (1) to use RLF Income only for those administrative expenses incurred during the same twelve-month period in which it is earned, and (2) to add any RLF Income remaining unexpended at the end of each period to the RLF capital base. RLF Income added to the RLF capital base may not be withdrawn, other than for lending purposes, without the prior written consent of the Government. The Recipient should refer to current EDA administrative instructions regarding specification of the twelve-month accounting period, the format for documenting income and expenses and such reporting requirements as may be applicable.

.07 *Indirect Costs*: a. The Recipient may use indirect costs as an eligible administrative expense chargeable against RLF Income if the indirect costs reflect an established indirect cost rate negotiated and approved by a cognizant Federal agency prior to the year end in which the costs are charged, subject to the limitation in subparagraph b. below.

b. The Department's acceptance of negotiated rates as provided in this section is

subject to total indirect costs not to exceed 100 percent of total direct costs charged against RLF Income. Where the indirect cost rate exceeds 100 percent, a 100 percent rate shall be used to compute the dollar amount of indirect costs.

c. Excess indirect costs will not be used to offset unallowable or disallowed direct costs when the total allowable costs are determined.

d. If the Recipient has not previously established an indirect cost rate with a Federal agency, the negotiation and approval of a rate is subject to the procedures in the applicable OMB costs principles and the following subparagraphs:

1. The Office of Inspector General (OIG) is authorized to negotiate indirect cost rates on behalf of the Department for those organizations which the Department is cognizant. The OIG will negotiate only fixed rates. The Recipient is required to submit to the OIG (with a copy of its transmittal letter provided to the Grants Officer) the documentation (indirect cost proposal, cost allocation plan, etc.) necessary to establish such rates 90 days prior to the year end in which indirect costs will be charged. If the documentation is not submitted during this time period, charges of indirect costs against RLF Income for that year will not be allowable and cannot be carried forward, unless the OIG determines there is a finding of good and sufficient cause to excuse the Recipient's delay in submitting the documents.

2. When a Federal agency other than the Department of Commerce has responsibility for establishing an indirect cost rate, the Recipient is required to submit to that Federal agency (with a copy of its transmittal letter provided to the Grants Officer and the Department of Commerce OIG) the documentation (indirect cost proposal, cost allocation plan, etc.) necessary to establish such rates within the Recipient's fiscal year during which indirect costs will be charged against RLF Income. If the documentation is not submitted during this time period, charges of indirect costs against RLF Income will be unallowable and cannot be carried forward, unless the OIG determines there is a finding of good and sufficient cause to excuse the Recipient's delay in submitting the documents.

.08 *Additional Funding and/or Extension of Award*: The Government has no obligation to provide any additional funding in connection with this award. Any renewal of this award to increase funding or to extend the period of performance is at the sole discretion of the Government.

.09 *Debts*: a. Any debts determined to be owed the Federal Government shall be paid promptly by the Recipient. A debt will be considered delinquent if it is not paid within 30 days of the due date. If the debt is not paid by the stated due date, the Recipient shall be

subject to late payment charges imposed by the Federal Government. The late payment charges are as follows:

1. Interest charge on the delinquent debt. As established by the Debt Collection Act of 1982, the minimum annual rate to be assessed is the Department of the Treasury's Current Value of Funds Rate. The interest charge shall accrue from the date of the letter which notifies the debtor of the debt and the interest requirements. This rate is published in the FEDERAL REGISTER by the Department of the Treasury. The assessed rate shall remain fixed for the duration of the indebtedness;

2. A penalty charge on any portion of a debt that is delinquent for more than 90 days, although the charge will accrue and be assessed from the date the debt became delinquent; and

3. An administrative charge to cover processing and handling of the amount due.

b. State and local governments are not subject to subparagraphs .11 a.2 and 3 above.

c. Once an account receivable has been established or a repayment agreement to pay the debt has been approved, failure to pay the debt by the due date on the billing may result in the suspension of payments to the Recipient under any current Department of Commerce awards and/or placement of the Recipient on a Reimbursement *Only* by Treasury Check method of payment until the debt is paid.

d. If a debt is over 30 days old, any Department of Commerce awards to the Recipient may be suspended and the Recipient may be suspended or debarred from further Federal financial and non financial assistance and benefits, as provided in 15 CFR Part 26, until the debt has been paid in full or until a repayment agreement has been approved and payments are made in accordance with the agreement. Failure to pay the debt or establish a repayment agreement by the due date will also result in the referral of the debt for collection action.

e. Payment of the debt may not come from other Federally sponsored programs. Verification that other Federal funds have not been used will be made during future program visits and audits.

.10 *Interest-Bearing Accounts:* All RLF grant funds disbursed to reimburse Recipients for loan obligations already incurred must be held in interest bearing accounts until disbursed to the borrower. In the event that a loan disbursement is delayed beyond 30 days from the date of receipt of the Federal disbursement, the undisbursed funds must be returned to the Government for credit to the Recipient's account. Interest earned on prematurely withdrawn funds must be returned to the Government (with the exception of \$100 per year which may be retained for administrative expenses by states, local governments and Indian tribes

per 15 CFR Part 24, and \$250 for those subject to OMB Circular A-110 or its implementing Department regulation) and shall be remitted promptly, but no less frequently than quarterly. All checks submitted should state "EDA" on their face and the award number followed by the word INTEREST in order to identify the check in question as remittance of interest income. Checks will be sent to the address below: Economic Development Administration, P.O. Box 100202, Atlanta, Georgia 30384.

.11 *Bonding and Payment of Funds:* Prior to payment of funds hereunder, the Recipient shall provide evidence to the Government that it has fidelity bond coverage of persons authorized to handle funds under this award in an amount determined by the Government sufficient to protect the interests of the RLF and the Government.

.12 *Grant Violations and Ineligible Costs:* The Recipient hereby agrees that the Government may, at its option, withhold disbursement of any award funds if the Government learns, or has knowledge, that the Recipient has failed to comply in any manner with any provision of the award. The Government will withhold funds until the violation or violations have been corrected to the Government's satisfaction. The Recipient further agrees to reimburse the Government for any ineligible costs which were paid from award funds. If a violation occurs or an ineligible expenditure is made subsequent to full disbursement of the grant, the Government, at its option, may elect to have the Recipient repay the RLF for the amount of any ineligible cost incurred. Failure to remedy an ineligible expenditure or grant violation will be grounds for suspension and/or termination.

F. REPORTING REQUIREMENTS

Financial and Performance Reports must be submitted according to the schedule indicated below. Failure to submit required reports in a timely manner may result in (1) withholding payments under this award, (2) deferring the processing of new awards, amendments, or supplemental funding pending the receipt of the overdue report(s), (3) establishing an account receivable for the difference between the total Federal share of Outlays last reported and the amount disbursed, and/or, (4) suspending or terminating the grant in whole, or in part.

.01 *Financial and Performance Reports:* The Recipient shall submit financial and status reports to the EDA Regional Office semi-annually unless otherwise instructed by the Government. The reports will be in a form prescribed by the Government and shall be submitted for a minimum of one year following full disbursement of the grant. Subsequently, the Recipient may be eligible for graduation to a shortened, annual reporting

format at the discretion of the Federal Program Officer. Graduation to the annual report will be based on an assessment of the Recipient's track record and on current RLF operations. The Recipient must obtain written authorization from the Government to convert to the annual reporting option.

Subsequently, the Recipient shall submit annual reports for the duration of the RLF unless the Federal Program Officer determines that more frequent and/or detailed reporting is necessary due to grant violations or other problems. Following remedial action, the Recipient may request the Federal Program Officer to convert back to annual reporting.

a. *Initial Semiannual Report:* Except for recapitalization awards, the Recipient shall submit the initial semiannual report on April 30, covering loan activity for the period ending March 31, (if the grant was awarded from April 1, through September 30), and on October 31, covering loan activity for the period ending September 30, (if the grant was awarded from October 1, through March 31).

b. *Subsequent Semiannual Reports:* Following the initial report, other than for recapitalization awards, the Recipient shall submit subsequent semiannual reports on either April 30, or October 31, covering RLF activity for the periods ending March 31, and September 30, respectively.

c. *Annual Reports:* If authorized by the Government, the Recipient shall submit annual reports in place of semiannual reports as instructed by the Government.

d. *Performance Measures:* The Recipient agrees to submit to EDA as part of the semiannual or annual reports referenced in F.01. (a.), (b.) and (c.) above, the information identified as the Core Performance Measures listed below. EDA will advise the Recipient in writing, not less than 90 days prior to the time for submission, in the event there are any modifications in the information required to be submitted.

A. Performance and Outcomes at the Completion of the Initial Round of Funding¹

- Compliance with implementation schedule for disbursement of RLF dollars.
- Jobs created and saved (actual) through RLF loans.
 - Number of loans made by the RLF.
 - Non-RLF dollars leveraged by the RLF loan.
 1. Private sector dollars.
 2. Other dollars leveraged.
 - RLF Capital Base (total RLF funding + program income – loan writeoffs).

¹Full disbursement of the grant award.

B. Project Outcomes after Full Disbursement of Grant

- Jobs created and saved (actual) through RLF loans.
- Number of loans made by the RLF.
- Non-RLF dollars leveraged by the RLF loan.
 1. Private sector dollars.
 2. Other dollars leveraged.
- RLF Capital Base (total RLF funding + program income – loan writeoffs).

.02 *Other Reports:* The Recipient agrees to submit other reports, as may be required from time to time, to the Government.

.03 *Subcontracting Reports:* Recipients of awards which involve both Federal financial assistance valued at \$500,000 or more and procurement of supplies, equipment, construction or services shall be required to submit the SF-334, "MBE/WBE Utilization Under Federal Grants, Cooperative Agreements, and Other Federal Financial Assistance." Reports shall be submitted on a quarterly basis for the period ending March 31, June 30, September 30, and December 31. Reports are due no later than 30 days following the end of the reporting period during which any procurement in excess of \$10,000 is executed under this award. The report should be submitted in duplicate to the EDA Regional Office.

G. ADMINISTRATIVE COST AND LOAN RECORDS RETENTION

.01 *Administrative Cost Records:* Records of administrative costs incurred for activities relating to the operation of the RLF shall be retained for three years from the actual submission date of the last Semiannual or Annual Report which covers the period during which such costs were claimed, or for five years from the date the costs were claimed, whichever is less. The retention period for records of equipment acquired in connection with the RLF shall be three years from the date of disposition, replacement, or transfer of the equipment.

.02 *Loan Records:* Loan files and related documents and records shall be retained over the life of the loan and for a three year period from the date of final disposition of the loan. The date of final disposition of the loan is defined as the date of: (1) full payment of the principal, interest, fees, penalties, and other fees or costs associated with the loan; or (2) final settlement or write-off of any unpaid amounts associated with the loan.

.03 *General:* If any litigation, claim, negotiation, audit or other action involving the RLF or its assets has commenced before the expiration of the three-year (or five-year) period, all administrative and program records pertaining to such matters shall be retained until completion of the action and the resolution of all issues which arise from it, or

until the end of the regular three-year (or five-year) period, whichever is later.

The record retention periods described in this section (Administrative Cost and Loan Records Retention) are minimum periods and such prescription is not intended to limit any other record retention requirement of law or agreement. Any records retained for a period longer than so prescribed shall be available for inspection the same as records retained as prescribed. In any event, EDA will not question administrative costs claimed more than three years old, unless fraud is an issue.

H. AUDIT

The Inspector General of the Department of Commerce, or any of his or her duly authorized representatives, shall have access to any pertinent books, documents, papers and records of the Recipient, whether written, printed, recorded, produced or reproduced by any mechanical, magnetic or other process or medium, in order to make audits, inspections, excerpts, transcripts or other examinations as authorized by law.

.01 Requirements: a. Federal Audit: Under the Inspector General Act of 1978, as amended, 5 USC App. I, section 1 *et seq.*, an audit of this award may be conducted at any time. The Office of Inspector General usually will make the arrangements to audit this award, whether the audit is performed by Inspector General personnel, an independent accountant under contract with the Department, or any other Federal, State or local audit entity.

b. *Recipient Audit:* 1. For awards to institutions of higher education, and other non-profit organizations, the Recipient is subject to the audit requirements found at 15 CFR Part 29b; for awards to governmental entities, the Recipient is subject to the audit requirements found at 15 CFR Part 29a.

2. Any audit report performed in compliance with the requirements of 15 CFR Part 29a or Part 29b shall be sent to the cognizant Federal agency and to the Federal Program Officer. A copy of the transmittal letter to the cognizant Federal agency should be provided to the Grants Officer. If the Department of Commerce is the cognizant Federal agency, the audit report should be sent to the following address: Federal Audit Clearinghouse, Bureau of the Census, 1201 East 10th Street, Jeffersonville, Indiana 47132.

c. For awards where a special award condition stipulates that an audit be conducted of this particular award, the Recipient shall arrange for an audit of the award in accordance with Governmental auditing standards.

.02 Establishment and Collection of Audit-Related Debts: a. An audit of this award may result in the disallowance of costs incurred by the Recipient and the establishment of a debt (account receivable) due the Government. For this reason, a Recipient should

take seriously its responsibility to respond to all audit findings and recommendations with adequate explanations and supporting evidence whenever audit results are disputed and the Recipient has the opportunity to comment.

b. A Recipient whose award is audited has the following opportunities to dispute the proposed disallowance of costs and the establishment of a debt:

1. Unless the Inspector General determines otherwise, the Recipient will be given 30 days from the transmittal of the *draft* audit report in which to submit written comments and documentary evidence.

2. The Recipient will be given 30 days from the transmittal of the *final* audit report in which to submit written comments and documentary evidence. There will be no extension of this deadline. Based on all of the evidence available at the expiration of this time period, the Department will make a decision on the actions it will take as a result of the final audit report.

3. The Government's decisions to disallow costs under the award and to establish a debt (as well as its decisions on non financial issues) will be sent to the Recipient in an Audit Resolution Determination letter. The Recipient will be given 30 days from the transmittal of this letter in which to pay any debt. This letter will contain information on the procedures to be followed by the Recipient to appeal the Department's decisions. An appeal does not preclude the Recipient's obligation to pay the debt nor does the appeal preclude the accrual of interest on the debt. The appeal must be submitted to the Grants Officer and the Office of Inspector General within 30 days after receipt of the Audit Resolution Determination letter. There will be no extension of this deadline. This appeal is the last opportunity for the Recipient to submit to the Department arguments and evidence that dispute the validity of the audit-related debt.

4. After the opportunity to appeal has expired, or after the final decision on reconsideration has been made, the Department will not accept any submissions from the Recipient concerning its dispute of the Department's decisions on the settlement of costs under the award. If the debt is not paid, the Department will undertake other collection action but will not thereafter reconsider the legal validity of the debt.

c. There are no other administrative appeals available in the Department of Commerce concerning this matter.

I. MISCELLANEOUS ITEMS

.01 Programmatic Changes: All requests by the Recipient for programmatic changes must be submitted to the Government which will notify the Recipient in writing of the determination.

.02 Name Check Review:

a. A name check review shall be performed by the Office of Inspector General on key individuals associated with non profit organizations. b. The Department reserves the right to take any of the actions described in subparagraph H.02 c. below if one of the following occurs as a result of the name check review:

1. Any of the key individuals associated with non profit organizations who are not exempt from the name check review fails to submit the Form CD-346 and, if required, the Form FD-258;

2. The Recipient, key individual, or any other person associated with this award made an incorrect statement or omitted a material fact on the Form CD-346 or Form FD-258; or

3. Significant adverse findings result from the name check review that reflect on the integrity or responsibility of the Recipient and/or key individual.

c. In the event of significant adverse findings from the name check review, the Government, at its discretion, may take one or more of the following actions:

1. Terminate the award immediately for cause;

2. Require the removal from association with the management of and/or implementation of the Project any person or persons and, if appropriate, require that the Grants Officer be afforded the right of final approval of any person or persons to replace any individual removed as a result of this condition; and/or

3. Make appropriate provisions or revisions at the Government's discretion with respect to method of payment and/or financial reporting requirements.

.03 Prohibition Against Assignment: Notwithstanding any other provision of this award, the Recipient shall not transfer, pledge, mortgage, or otherwise assign this award, or any interest therein, or any claim arising thereunder, to any party or parties, bank trust companies, or other financing or financial institutions.

.04 Covenant Against Contingent Fees: Unless otherwise specified in the Special Award Conditions, the Recipient warrants that no person or selling agency has been employed or retained to solicit or secure this award upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees, or bona fide established commercial, or selling agencies maintained by the Recipient for the purpose of securing business. For breach or violation of the warrant, the Government shall have the right to cancel this award without liability or, at its discretion, to deduct from the award sum, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

.05 Officials Not To Benefit: No member of or delegate to Congress or resident Federal

Commissioner shall be admitted to any share or part of this award or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this award if made to a corporation, education, or non-profit institution for its general benefit.

.06 Sub-Award and/or Contract to Other Federal Agencies: a. The Recipient, sub-recipient, contractor and/or subcontractor shall not sub-grant or subcontract the Project in whole or in any part to any agency of the Department of Commerce.

b. The Recipient, subrecipient, contractor and/or subcontractor, shall not sub-grant or subcontract any part of the Project to any other Federal department, agency or instrumentality, without the advance written approval of the Grants Officer.

.07 Property Management: The Recipient may utilize RLF Income generated from loan activities to acquire property necessary to administer the RLF. Neither grant funds nor match funds shall be used to purchase property for RLF administration. RLF Income (defined in Section E.06) can only be used to acquire necessary RLF property to the extent of the benefits received.

Eligible property for RLF activities will normally include (1) Expendable Personal Property (which includes all tangible personal property, including supplies, other than nonexpendable property), and (2) Non-expendable Personal Property (which includes tangible personal property, including equipment).

Title to Expendable and Nonexpendable Personal Property acquired in whole or in part with RLF Income for use in the RLF shall vest with the Recipient. The Recipient shall not encumber its title or other interests in RLF property without prior written approval from the Government. The Recipient shall use and manage nonexpendable personal property as long as needed and shall maintain nonexpendable personal property records, control systems and physical inventories.

a. Disposition of Personal Property: In the ordinary course of business, the Recipient may dispose of personal property for upgrading purposes or when no longer needed for the project activity. The RLF's share of the proceeds from any disposition shall be treated as a contribution to RLF Income and may be returned to the RLF for lending or used for RLF administrative expenses.

b. Disposition of Expendable and Non-expendable Property Under RLF Termination: If the RLF is terminated, the Recipient shall submit a request for disposition instructions to the Federal Program Officer who shall provide the Recipient with disposition instructions. Disposition may include one of the following:

1. If the total aggregate fair market value of unused personal property at the termination of the RLF is \$1,000 or less for awards

subject to OMB Circular A-110 or any Department rule superseding such Circular, or \$5,000 or less for awards subject to 15 CFR Part 24 and is not needed for any other Federally-sponsored project or program, the Recipient may retain or sell the expendable personal property without compensating the Government.

2. If the total aggregate fair market value of personal property at the termination of the award exceeds \$1,000 for awards subject to OMB Circular A-110 or any Department rule superseding such Circular, or \$5,000 for awards subject to 15 CFR Part 24 and is not needed for any other Federally-sponsored project or program, the Recipient may retain, sell, or otherwise dispose of the property and shall compensate the Government for its share.

3. The following apply only to the disposition of nonexpendable personal property:

(a) The Recipient shall submit a completed form CD-281, "Report of Government Property in Possession of Contractor" along with the request for disposition instructions.

(b) The Government's disposition instructions may additionally include the following: (1) The Recipient may be instructed to ship the nonexpendable personal property elsewhere. The Recipient may receive the non-federal share of the market value plus shipping costs; or (2) for awards subject to the provisions of OMB Circular A-110 or Department regulation superseding such Circular, the Government reserves the right to transfer title to the Federal Government or to a third party named by the awarding agency if the nonexpendable personal property had a unit acquisition cost of \$1,000 or more. For awards subject to 15 CFR Part 24, the Government reserves the right to transfer title to the Federal Government or to a third party named by the awarding agency for any nonexpendable personal property. When title is transferred, the Recipient shall be compensated for its share.

c. **Disposition of Real Property Under RLF Termination:** If the RLF is terminated and the Recipient holds title to real property through foreclosure or other legal actions, the Recipient shall request disposition instructions from the Regional Program Officer. Disposition may include one of the following:

1. The Recipient shall retain title after it compensates the Federal Government for its share;

2. The Recipient shall sell the property and pay the Federal Government for its share after the deduction of any actual and reasonable selling and fix-up expenses, if any, from the sales proceeds; or

3. The Recipient shall transfer title to the property to the Federal Government provided that in such cases the Recipient shall be entitled to compensation computed by applying the Recipient's percentage of partici-

pation in the cost of the project to the current fair market value of the property.

d. **Debt Instruments Under RLF Termination:** If the RLF is terminated, the Recipient shall request disposition instructions from the Regional Program Officer for disposition of debt instruments in the RLF portfolio.

.08 **Rights to Inventions Made by Nonprofit Organizations and Small Business Firms:** The policy and procedures set forth in Department of Commerce regulations 37 CFR Part 401, Rights to Inventions made by Nonprofit Organizations and Small Business Firms under Government Grants, Contracts, and Cooperative Agreements, published in the FEDERAL REGISTER on March 18, 1987, shall apply to all grants and cooperative agreements made where the purpose is experimental, developmental, or research work.

Pursuant to Executive Order 12899, the Department is required to notify the owner of any valid patent covering technology whenever the Department or its financial assistance Recipients, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner.

To ensure proper notification, if the Recipient uses or has used patented technology under this award without a license or permission from the owner, the Recipient must notify the Department Patent Counsel at the following address, with a copy to the Grants Officer: U.S. Department of Commerce, Office of Chief Counsel for Technology, Patent Counsel, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230.

The notification shall include the following information:

a. The award number.

b. The name of the Department awarding agency.

c. A copy of the patent.

d. A description of how the patented technology was used.

e. The name of the Recipient contact, including an address and telephone number.

.09 **Executive Order 12432, Minority Business Enterprise:** In support of Executive Order 12432, signed by the President on July 14, 1983, the Department of Commerce encourages all Recipients to utilize minority firms and enterprises in contracts under grants and cooperative agreements. The Office of Program Development, Minority Business Development Agency, will assist Recipients in matching qualified minority enterprises with contract opportunities. For further information contact: U.S. Department of Commerce, Minority Business Development Agency, Office of Program Development, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230.

.10 Internal Revenue Service (IRS) Information: a. A Recipient classified for tax purposes as an individual, partnership, proprietorship, or medical corporation is required to submit a taxpayer identification number (TIN) (either social security number or employer identification number as applicable) on Form W-9, "Payer's Request for Taxpayer Identification Number."

Tax-exempt organizations and corporations (with the exception of medical corporations) are excluded from this requirement. The Recipient should submit the form to the Grants Officer within 60 days of the effective date of award.

The Department provides the Recipient's TIN to the IRS on Form 1099-G, "Statement for Recipients of Certain Government Payments." Applicable Recipients who either fail to provide their taxpayer identification number or provide an incorrect number may not be eligible for funding or have funding suspended until the requirement is met.

b. Privacy Act Statement—Mandatory Disclosure, Authority, Purpose, and Uses: Disclosure of your social security number or employer identification number is mandatory for Federal income tax reporting purposes under the authority of 26 U.S.C., Section 6011 and 6109(d), and 26 CFR Part 301, Section 301.6109-1. This is to ensure the accuracy of income computation by the Internal Revenue Service. This information will be used to identify an individual who is compensated by funds of the Department of Commerce or paid interest under the Prompt Payment Act. A Recipient who either fails to provide the taxpayer identification number or provides an incorrect number may not be eligible for funding or have funding suspended until requirement is met. This information is being provided to the Internal Revenue Service on Form 1099.

.11 Government wide Debarment, Suspension and Other Responsibility Matters (Nonprocurement): a. This award is subject to Executive Order 12549, Debarment and Suspension, and 15 CFR Part 26, "Government wide Debarment and Suspension (Nonprocurement)." A person (as defined at 15 CFR §26.105(n)) who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities except to the extent prohibited by law or authorized in writing by the Department.

b. The Recipient shall provide immediate notification to the Grants Officer if at any time the Recipient learns that its certification, Form CD-511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying," was erroneous when submitted or has become erroneous by reason of changed circumstances. Subrecipients in lower tier transactions shall provide the same updated notice to the Recipient.

c. Unless the Department authorizes in writing an exception in accordance with 15 CFR §§26.215, 26.220, and/or 26.625, the Recipient of this award shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. The Recipient shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible, or voluntarily excluded, except as provided in 15 CFR Part 26.215. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate.

d. The Recipient shall require each applicant/bidder for a lower tier covered transaction (except subcontracts for goods or services under the \$100,000 small purchase threshold unless the subtier Recipient will have a critical influence on or substantive control over) at any tier under this award to file a certification, Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions and Lobbying," without modification, for it and its principals in any proposal/solicitation submitted in connection with the lower tier covered transaction. Certifications shall be retained by the Recipient.

e. The Recipient shall include the following provisions regarding debarment and suspension in all subtier covered transactions:

1. This lower tier covered transaction is subject to Executive Order 12549, "Debarment and Suspension," and 15 CFR Part 26, "Government wide Debarment and Suspension (Nonprocurement)." Unless authorized by the Department in writing, a person (as defined at 15 CFR §26.105(n)) who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities except to the extent prohibited by law or authorized by the Department.

2. Unless the Department authorizes in writing an exception in accordance with 15 CFR §§26.215, 26.220, and/or 26.625, the Recipient of this lower tier covered transaction shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. The Recipient of this sub-award shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible, or voluntarily excluded, except as provided in 15 CFR §26.215.

f. The Recipient shall include the following provision in each application and in each bid

for a lower tier covered transaction at any tier under this award:

Each applicant/bidder for a lower tier covered transaction (except subcontracts for goods or services under the \$100,000 small purchase threshold unless the subtier Recipient will have a critical influence on or substantive control over the award) at any tier under this Federal award must file Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions and Lobbying," without modification, at the time of application/bid.

Applicants/bidders should review the instructions for certification included in the regulations before completing the certification. The prospective lower tier participant shall provide immediate written notice to the person to whom this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Certifications shall be retained by the Recipient.

12 Restrictions on Lobbying (applicable to awards exceeding \$100,000 in Federal funding):
a. This award is subject to Section 319 of Public Law 101-121, which added Section 1352, regarding lobbying restrictions, to Chapter 13 of Title 31 of the United States Code as implemented by 15 CFR Part 28. The Recipient of this award and subrecipients are generally prohibited from using Federal funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with this award.

b. The Recipient shall require each person who requests or receives from the Recipient a sub-grant, contract, or subcontract exceeding \$100,000 of Federal funds at any tier under this award, to file Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions and Lobbying," without modification, and, if applicable, SF-LLL, "Disclosure of Lobbying Activities," form regarding the use of any non-federal funds for lobbying. Certifications shall be retained by the next higher tier. All disclosure forms, however, shall be forwarded from tier to tier until received by the Recipient, who shall forward all disclosure forms to the Grants Officer.

c. The Recipient shall include the following provision in all contracts, subcontracts, or sub-grants:

This contract, subcontract, or sub-grant is subject to Section 319 of Public Law 101-121, which added Section 1352, regarding lobbying restrictions, to Chapter 13 of Title 31 of the United States Code as implemented by 15 CFR Part 28. Each bidder/applicant/recipient of this contract, subcontract, or sub-grant and subrecipients are generally prohibited from using Federal funds for lobbying the

Executive or Legislative Branches of the Federal Government in connection with this award.

d. The Recipient shall include the following contract clauses regarding lobbying in each application for a sub-grant and in each bid for a contract or subcontract exceeding \$100,000 of Federal funds at any tier under the Federal award:

Each applicant/recipient of a subgrant and each bidder/applicant/recipient of a contract or subcontract exceeding \$100,000 of Federal funds at any tier under the Federal award must file Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions and Lobbying," and Standard Form-LLL, "Disclosure of Lobbying Activities," regarding the use of any nonfederal funds for lobbying. Certifications shall be retained by the next higher tier. All disclosure forms, however, shall be forwarded from tier to tier until received by the Recipient of the Federal award, who shall forward all disclosure forms to the Grants Officer.

Each subgrantee, contractor, or subcontractor that is subject to the Certification and Disclosure provision of this Contract Clause is required to file a disclosure form within 15 days of the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person. Disclosure forms shall be forwarded from tier to tier until received by the Recipient of the Federal award (grant), who shall forward all disclosure forms to the Grants Officer.

APPENDIX C TO PART 308—SECTION 209 ECONOMIC ADJUSTMENT PROGRAM REVOLVING LOAN FUND GRANTS; AD- MINISTRATIVE MANUAL

OMB Approval No. 0610-0095

Approval expires 07/31/99

BURDEN STATEMENT FOR REVOLVING LOAN FUND ADMINISTRATIVE MANUAL:

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

The information is required to obtain or retain benefits from the Economic Development Administration pursuant to Economic Development Administration Reform Act, Public Law 105-393. No confidentiality for the information submitted is promised or provided except that which is exempt under

5 U.S.C. 552(b)(4) as confidential business information.

The public reporting burden for this collection is estimated to average 12 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Economic Development Administration, Herbert C. Hoover Building, Washington, DC, 20230, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

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I. PURPOSE

This Manual describes the compliance, reporting, grant record keeping and other administrative requirements and procedures that apply to Revolving Loan Fund (RLF) grants funded by the Economic Development Administration (EDA) under Section 209 of the Public Works and Economic Development Act of 1965, as amended. These requirements apply to new RLFs and to the future actions of all RLFs funded prior to the Manual's effective date. The requirements apply to RLFs funded under the Sudden and Severe Economic Dislocation (SSED) and the Long-Term Economic Deterioration (LTED) components of Section 209. They also apply to the revolving phases of RLFs funded for the initial purpose of providing financing to one or more identified business firms.

II. AUTHORITY

A. Grant Recipients as Trustees: Recipients of EDA grants to operate RLFs hold RLF funds in trust to serve the purpose of the Economic Adjustment program for which the grant award was made. The grant recipient's obligation to the Federal Government continues as long as the Federal interest in EDA RLF assets, in the form of cash, receivables, personal and real property, and notes or other financial instruments developed through the use of the funds, continues to

exist. If EDA determines that a grant recipient is failing to meet this obligation, the Agency will assert its equitable reversionary interest in the RLF assets. However, EDA's nonassertion of its interest does not constitute a waiver thereof.

B. Grantor Authority to Change Policies: EDA, as the Federal agency charged with implementing the program, is obligated to promulgate policies and procedures applicable to all RLF grant recipients to insure compliance with Federal requirements, to safeguard the public's interest in the grant assets, and to promote effective use of the funds in accomplishing the purpose for which they were granted.

Pursuant to this obligation, grant terms and conditions require grant recipients to comply with changes in regulations and other requirements and policies that EDA may issue from time-to-time. Such changes apply to actions taken by all grant recipients, existing and prospective, after the effective date of the changes. Loans made by grant recipients prior to the effective date of the changes are not affected unless so required by law.

As a matter of policy, EDA will subject proposed RLF changes to public review when practicable.

EDA's policy is to administer RLF grants uniformly, but it is understood that there may be situations warranting a variance. To accommodate these situations and to encourage innovative and creative ways to address economic adjustment problems, requests for variances to the requirements of this Manual will be considered if they are consistent with the goals of the Section 209 program and with an RLF's strategy, make sound economic and financial sense, and do not conflict with applicable legal requirements.

C. Precedence of Grant Documents and Published Regulations: The Grant Award, executed by EDA and the recipient, together with the Budget, Special Terms and Conditions and the Standard Terms and Conditions, as may be amended, and the current regulations, published at 13 CFR Part 308, constitute the requirements, hereinafter referred to as "Terms and Conditions," applicable to an EDA RLF grant. This Manual is designed to clarify and administratively implement those requirements. In the event of conflict, the aforementioned documents take precedence over this Manual.

III. GRANTEE RESPONSIBILITIES

A. Prudent Lending Practices: RLF grant recipients are required to operate RLFs in accordance with lending practices generally accepted as prudent for public loan programs. Such practices cover loan processing, documentation, servicing and administrative procedures, as outlined in the current RLF Plan Guidelines.

B. Protection of RLF Assets: RLF grant recipients are required (1) to obtain adequate and appropriate collateral from borrowers, and (2) to act diligently to protect the interests of the RLF, through collection, foreclosure, or other recovery actions on defaulted loans.

C. Federal Requirements Applicable to Grant Recipients: Grant recipients are responsible for complying with the Federal laws and regulations, Executive Orders and Office of Management and Budget (OMB) Circulars which are referenced in the Terms and Conditions, as may be amended, for RLF grants. These include administrative and audit requirements, cost principles, and other laws, regulations and Executive Orders pertaining to requirements from civil rights to lobbying restrictions.

D. Federal Requirements Applicable to RLF Borrowers: Grant recipients are responsible for ensuring that prospective borrowers are aware of, and comply with, the Federal statutory and regulatory requirements that apply to activities carried out with RLF loans. The most common of these requirements relate to environmental protection, civil rights, Davis-Bacon wage rates and handicap access on construction projects, and the prohibited use of RLF funds for businesses that relocate jobs from one commuting area to another.

Grant recipients are responsible for developing an appropriate review process in accordance with the intent of the National Environmental Policy Act of 1969, (P.L. 91-190) as amended, as implemented by the "Regulations" of the President's Council on Environmental Quality. The process shall include disapproval of loan projects which would adversely (without mitigation) impact floodplains, wetlands, significant historic or archeological properties, drinking water resources, or nonrenewable natural resources. Grant recipients are also responsible for openly marketing the RLF to prospective minority and women borrowers, and monitoring borrower compliance with civil rights requirements that prohibit borrowers from discriminating against employees or applicants for employment, or providers of goods and services. These and the other Federal requirements described in the Terms and Conditions of each grant should be included, as applicable, in each RLF's standard loan agreement to ensure borrower compliance where necessary. Grant recipients are expected to act diligently to correct instances of noncompliance, including the recall of loans, if necessary.

IV. REVOLVING LOAN FUND RESTRICTIONS

The following restrictions apply generally to RLFs:

A. Lending Area Restrictions

1. *Eligible Lending Area:* The economic activity and the benefits of RLF loans must be located within the eligible areas identified in the grant award.

2. *Modification of the Eligible Area:* Areas within the operational jurisdiction of the grant recipient that were not identified in the grant award, but that meet or may subsequently meet the Agency's criteria for eligibility under Section 209, may qualify to be added to an RLF's eligible lending area. To ascertain qualification, a grant recipient must make a written request to EDA to determine whether a new area is eligible for assistance under existing grant terms. Area eligibility data are updated quarterly and eligibility lists are maintained by EDA's Regional Offices. Unless stipulated otherwise in the grant award, once an area's eligibility is approved by EDA, that area retains its eligibility indefinitely.

3. *Recapitalization Rule:* If EDA funds are used to recapitalize an existing RLF, the new grant funds may be used only in areas eligible for assistance at the time the recapitalization grant is invited (and in areas that become eligible between the time of invitation and the grant award). Areas that were eligible under the previous EDA grant award but not under the new award may continue to receive RLF assistance under the previous grant award only. Areas which become eligible subsequent to the grant award require EDA approval as discussed above in Section IV.A.2.

If a grant recipient has received EDA funds to recapitalize an existing RLF and the respective grants serve different eligible lending areas, the grant recipient is responsible for maintaining adequate accounting records to substantiate that each grant is being used in the appropriate eligible lending area.

B. Borrower Restrictions

1. *Eligible Lending Area:* An RLF borrower must retain the activity financed in the eligible lending area for the term of the loan. The RLF's standard loan agreement should include a provision to call the loan if the activity financed is moved from the eligible lending area.

2. *Relocation:* RLF financing may not be used by a borrower for any activity that serves to relocate jobs from one commuting area to another. This applies both to a business which uses RLF financing to relocate jobs into an eligible area from a different commuting area, and to a business which relocates jobs, created as a result of RLF financing, to a different commuting area. An RLF's standard loan agreement should include a provision for calling the loan if it is determined that (a) the business used the RLF loan to relocate jobs from another commuting area, or (b) the activity financed was

subsequently moved to a different commuting area to the detriment of local workers. The commuting area is that area defined by the distance people travel to work in the locality of the project receiving RLF financial assistance.

3. *Credit Otherwise Available:* A borrower is not eligible for RLF financing if credit is otherwise available on terms and conditions which would permit completion and/or the successful operation or accomplishment of the project activities to be financed. The grant recipient is responsible for determining that each borrower meets this requirement and for documenting the basis for its determination in the loan write-up. A loan write-up must include a discussion of the particular features of the local capital market and/or of the individual borrower or project to be financed that result in the need for RLF financing. It should also briefly describe the key aspects of the business and the loan including a discussion of the prospective borrower's ability to repay.

The grant recipient is also responsible for obtaining supplemental evidence, as appropriate, to support the need for RLF financing. This may include the following:

a. A commitment letter from a participating bank stating the loan terms, the maximum amount to be extended by the bank, and the need for the RLF's participation; and/or

b. Bank rejection letter(s), if obtainable, listing the proposed loan terms.

Exception to Credit Test: RLF financing may also be used as an incentive, through favorable loan terms, to attract a new business or a business expansion into an eligible area. The business may be credit worthy but would otherwise not locate in the area without RLF financing as an incentive. To undertake this type of project, the grant recipient must sufficiently document the need for RLF assistance and should obtain certification from the company, stating that it would not locate the proposed project at the intended location without RLF assistance. Grant recipients are cautioned that failure to document adequately the need for an RLF loan may be grounds for declaring a loan ineligible and requiring the grant recipient to repay any outstanding loan balance to the RLF, or return the Federal share to EDA.

4. *Public and Quasi-Public Borrowers:* A public or quasi-public organization is not eligible to receive RLF financial assistance unless (a) the activity financed directly benefits or will directly benefit identifiable business concerns, and (b) there is reasonable assurance that the activity financed will result in increased business activity in the near term.

5. *Private Developers:* Private developers are not eligible for RLF assistance unless the activity financed is non-speculative, consistent with the strategic and lending objectives of

the RLF, and directly benefits or will directly benefit identifiable business concerns.

6. *Other*: A grant recipient shall not use its RLF to make a loan to itself or to a related organization.

C. Financing Restrictions

1. Loans to a borrower for the purpose of investing in interest bearing accounts, certificates of deposit, or other investments not related to the objectives of the RLF are prohibited. To preclude ineligible uses of RLF funds, the purpose of each RLF loan should be clearly stated in the RLF loan agreement.

2. For initial RLF grants, the total dollar amount of loans for working capital purposes may not exceed 50% of the total RLF capital prior to the full disbursement of grant funds, unless otherwise stipulated in the grant agreement. ("RLF capital" consists of the funds which capitalized the RLF plus such earnings and fees generated by RLF activities as may be added to the RLF capital base to be used for lending.) For recapitalization grants and for initial grants after the grant funds are fully disbursed, the portfolio working capital percentage may, with EDA's prior written approval, exceed 50 percent. In reviewing requests to increase the 50 percent limit on working capital loans, EDA will consider, among other things, the grant recipient's experience with working capital loans and whether the request is consistent with the area's Economic Adjustment Strategy and the RLF Plan.

3. RLF capital may not be used to:

a. Acquire an equity position in a private business;

b. Subsidize interest payments on an existing loan;

c. Provide the equity contribution required of borrowers under other Federal loan programs;

d. Enable an RLF borrower to acquire an interest in a business, either through the purchase of stock or through the acquisition of assets, unless the need for RLF financing is sufficiently justified, and documented in the loan write-up (referenced in IV.B.3 above). Acceptable justification could include acquiring a business to substantially save it from imminent foreclosure or acquiring it to expand it with increased investment. In any case, the resulting economic benefits should be demonstrably consistent with the strategic objectives of the RLF;

e. Refinance existing debt unless:

(1) There is sound economic justification and the grant recipient sufficiently documents in the loan write-up that the RLF is not replacing private capital solely for the purpose of reducing the risk of loss to an existing lender(s) or to lower the cost of financing to a borrower, or

(2) An RLF uses RLF income sources and/or recycled RLF funds to purchase the rights of a prior lienholder during an in-process

foreclosure action in order to preclude a significant loss on an RLF loan. This action may be undertaken only if there is a high probability of receiving compensation within a reasonable time period (18 months) from the sale of assets sufficient to cover an RLF's expenses plus a reasonable portion of the outstanding loan obligation.

(Note: Since a grant recipient will be required to repay the amount of an ineligible loan, it is recommended that EDA be contacted for clarification or written confirmation if there is any question regarding either of the refinancing exceptions described above.)

4. Prior to full disbursement of grant funds, the grant recipient may not use the RLF to guarantee loans made by other lenders. In the revolving phase, after the full disbursement of grant funds, the RLF may be used to guarantee loans of private lenders provided the Recipient has obtained EDA's prior written approval of its proposed loan guarantee activities. The plan for any loan guarantee activities should include the following information:

a. The maximum guarantee percentage that will be offered;

b. A certification from the RLF attorney that the guarantee agreement is acceptable by local standards. At minimum, the guarantee agreement must include the following: the maximum reserve requirement; the rights and duties of each party in regard to loan collections, servicing, delinquencies and defaults; foreclosures; bankruptcies; collateral disposition and the call provisions of the guarantee; and interest income and loan fees, if any, which will accrue to the RLF.

D. Interest Rates

A grant recipient can make loans and loan guarantees to eligible borrowers at interest rates and under conditions determined by the Recipient to be most appropriate in achieving the goals of the RLF. However, the minimum interest rate an RLF can charge is four (4) percentage points below the current money center prime rate quoted in the Wall Street Journal or the maximum interest rate allowed under State law, whichever is lower, but in no event may the interest rate be less than four (4) percent. However, should the prime interest rate exceed fourteen (14) percent, the minimum RLF interest rate is not required to be raised above ten (10) percent if to do so would compromise the ability of the RLF to implement its financing strategy.

E. Private Leveraging

Unless stipulated otherwise in the grant agreement, RLF loans must be used to leverage private investment of at least two dollars for every one dollar of RLF investment. This leveraging requirement applies to the

portfolio as a whole rather than to individual loans and is effective for the life of the RLF. Private investment, to be classified as leveraged, must be made concurrently with an RLF loan as part of the same business development project and may include (1) capital invested by the borrower or others, (2) financing from private entities, and (3) 90 percent of the guaranteed portions of SBA 7(a) and SBA 504 debenture loans. Private investments do not include equity build-up in a borrower's assets or prior capital investments by the borrower unless made within nine months of the RLF loan and with the concurrence of the RLF Recipient. If a grant recipient can demonstrate that the 2:1 leverage requirement is too restrictive for its lending area and that it impedes the purpose for which the grant was made, it may request EDA to waive or modify the grant agreement.

V. RLF CAPITAL

A. RLF Capitalization

The original sources of capital for EDA RLFs are normally EDA grant funds and a nonfederal cash matching share. The EDA grant funds and the nonfederal matching funds can be used only for the purpose of making loans under an RLF, unless otherwise provided for in the grant agreement and grant budget, e.g., budgeted audit costs. Costs associated with the preparation of the grant application are not eligible expenses and are not reimbursable from the funds invested as RLF capital.

B. Nonfederal Matching Share

The grant agreement specifies the amount of nonfederal cash share required for an RLF grant. This is usually not less than 25% of the total RLF capital investment. The nonfederal share funds must be loaned either before or proportionately with EDA funds. Upon repayment, the nonfederal share funds are treated the same as EDA funds, repayments of principal must be placed in the RLF for relending and interest payments must be used either for relending or for eligible RLF administrative costs. The nonfederal matching share must be available when needed for lending and must be under the control of the grant recipient (or its designee) for the duration of the RLF for use in accordance with the terms of the grant.

C. Partial Termination and Deobligation

In the event that a portion of the EDA grant is terminated and deobligated (refer to Section XII. below) and is no longer available to a grant recipient due to its failure to meet the terms of a grant, the nonfederal matching share shall remain in the RLF unless otherwise specified in the grant agreement or agreed to in writing by EDA.

VI. RLF ADMINISTRATIVE COSTS

A. General Requirements

Grant recipients are responsible for the administrative costs associated with operating an RLF. Evidence of sufficient and reliable sources of funds to cover RLF administrative expenses is a key factor in project selection. As grant funds are disbursed for loans and an RLF begins to generate income from lending activities, such income (referred to as "RLF Income" and defined in Section VII.A.), as distinguished from principal repayments, may be used to cover eligible, reasonable, and documented administrative costs necessary to operate the RLF. When RLF Income is used for RLF administrative expenses, rather than added to the RLF capital base for lending, grant recipients are required to complete an RLF Income and Expense Statement as discussed in Section VII.C.2.

B. Auditing Costs

The grant budget accompanying the grant award lists the maximum amount of grant funds that may be used to defray the costs of audits required under the terms of the grant. In addition to funds budgeted in the grant award, audit costs may be reimbursed from RLF Income and from resources of the grant recipient. Audit costs are chargeable against the grant award if permitted in the grant budget and RLF Income to the extent that the costs charged are equitably distributed and reflect the benefits received. Grant funds budgeted for audit costs that are unused may be reallocated to the RLF capital base without EDA's permission. Additional information on grant audits is discussed in Section XI.B. and in EDA's Revolving Loan Funds Grants Audit Guidelines (RLF Audit Guidelines).

C. Other Eligible RLF Administrative Costs

Costs eligible for reimbursement from RLF Income must be consistent with the cost principles outlined in the appropriate OMB cost principle circular (OMB A-21, A-87 or A-122) and with the RLF Audit Guidelines. The requirements for using RLF Income are discussed in detail in Section VII.

Some of the common administrative costs that may be charged against RLF Income include RLF staff salaries and fringe benefits, RLF-related training, travel, marketing, general administration, business counseling and management assistance, portfolio management, materials and supplies, equipment rental and acquisitions prorated based on RLF usage, building rent, outside professional services, insurance, loan closing costs and the costs to protect collateral subsequent to foreclosure.

RLF administrative costs may be separated into direct and indirect costs. Direct

costs are those that can be identified specifically with a particular cost objective, such as an RLF program; indirect costs are those that are incurred for a common or joint purpose benefitting more than one program or cost objective and are not readily assignable. All costs charged against RLF Income must be supported by formal accounting records and source documentation. All indirect and joint costs charged against RLF Income must additionally be supported by a cost allocation plan approved by the cognizant Federal agency.

VII. RLF INCOME

A. Definition

RLF Income includes interest earned on outstanding loan principal, interest earned on accounts holding RLF funds not needed for immediate lending, all loan fees and loan-related charges received from RLF borrowers, and other income generated from RLF operations. (Note that the definition of RLF Income does not include repayments of loan principal because RLF principal repayments represent the return of capital and not "income". Consequently, RLF Income is a narrower definition of income than "program income" in the Uniform Administrative Requirements For Grants And Cooperative Agreements To State And Local Governments in 15 CFR Part 24.25, which includes principal repayments).

In accounting for RLF Income, any proceeds from the sale, collection, or liquidation of a defaulted loan, up to the amount of the unpaid principal, will be treated as repayments of RLF principal and placed in the RLF for lending purposes only. Any proceeds in excess of the unpaid principal will be treated as RLF Income.

B. Eligible Uses

While RLF Income can be used to pay for eligible and reasonable administrative costs as discussed above, RLF grant recipients are expected to add a reasonable percentage of RLF Income to the RLF capital base to compensate not only for loan losses and the effects of inflation over time, but also to maintain a minimum funding level for the future borrowing needs within the eligible lending area. To determine the appropriate amount of RLF Income to return to an RLF, RLF operators should consider the costs necessary to operate an RLF program, the availability of other monetary resources, the portfolio risk level and projected capital erosions from loan losses and inflation, the community's (or area's) commitment to the RLF, and the anticipated demand for RLF loans.

(Note: RLF Income that is not used for administrative purposes during the twelve month period in which it is earned must be added to the RLF capital base for lending purposes by the end of the twelve month pe-

riod (see Section VII.C.2. below for selection of the twelve month period). Only RLF Income earned during a current period may be used for current administrative expenses. RLF Income may not be withdrawn from an RLF in a subsequent period for any uses, other than lending, without the written consent of EDA.)

C. Administrative Requirements

Grant recipients electing to use RLF Income to cover all or part of a RLF's administrative costs must comply with the following provisions:

1. *Accounting Records:* Grant recipients must (a) maintain adequate accounting records and source documentation to substantiate the amount and percent of RLF Income expended for eligible RLF administrative costs, and (b) comply with applicable OMB cost principles and with the RLF Audit Guidelines when charging costs against RLF Income. Records must be retained by grant recipients for at least three years. If fraud is an issue, records must be retained until the issue is resolved.

2. *RLF Income and Expense Statement:* The Recipient must complete the RLF Income and Expense Statement (RLF Income Statement) located in Exhibit A, within 90 days of the twelve month period ending either September 30 or the Recipient's fiscal year end, whichever period is selected by the Recipient. The Recipient shall notify EDA of its selection in its first report to EDA. Once the period is selected, it may not be changed without prior written permission of EDA.

In lieu of completing an RLF Income Statement, the grant recipient may substitute information contained in an independent audit report provided it is in substance and in detail comparable to that provided in the RLF Income Statement. Should an audit report be used, the grant recipient will have to provide additional information certifying certain employee information requested in the RLF Income Statement.

3. *Reporting Requirements:* Grant recipients using fifty (50) percent or more or \$100,000 or more of RLF Income for RLF administrative expenses during the selected twelve month period must submit the completed RLF Income Statement to the EDA Regional Office within 90 days of the period ending date. Grant recipients whose RLF Income usage is under 50 percent and less than \$100,000 shall retain the RLF Income Statement for three years. The grant recipient shall make it available to EDA personnel upon request.

4. *Ineligible Costs:* For any costs determined by EDA to have been an ineligible use of RLF Income, the grant recipient shall reimburse the RLF or EDA. EDA will notify the grant recipient of the time period allowed for, and the manner in which to make, reimbursement.

VIII. REVOLVING LOAN FUND PLAN

A. Purpose

Grant recipients are required by the terms and conditions of the grant agreement to manage RLFs in accordance with an RLF Plan (Plan) generally approved prior to the grant award. The Plan serves two purposes. First, it summarizes how the RLF will be used to support implementation of the area's economic adjustment strategy, a statutory prerequisite to award of a Section 209 Implementation grant. Second, it documents the operating procedures established by the grant recipient to ensure consistent administration of the RLF in accordance with the Terms and Conditions of the grant and prudent public lending practices.

B. Format and Content

The Plan has two distinct parts. Part I, "The RLF Strategy," summarizes the area's economic adjustment strategy, including the business development objectives, and describes the RLF's financing strategy, policies and portfolio standards. Part II, "RLF Operating Procedures," serves as the internal operating manual for the RLF. The grant recipient is required to address a number of topics specifically identified by EDA, but otherwise has considerable discretion in designing and documenting operating procedures appropriate to the relative scale and complexity of its financing function. The required format and content for the two parts of the Plan are described in EDA's RLF Plan Guidelines.

C. EDA Approval

Unless specifically otherwise permitted by EDA, the Plan must be approved by EDA prior to the grant award.

D. Annual Plan Certification

Grant recipients are required to certify annually with the submission of the program report for the period ending September 30 (see Section XI.A), that the RLF loan board and the grant recipient's governing board have reviewed the RLF's performance for the preceding year relative to the area's adjustment strategy and the RLF Plan and have determined that:

1. The RLF Plan is consistent with and supportive of the area's current economic adjustment strategy; and
2. The RLF is being operated in accordance with the policies and procedures contained in the RLF Plan, and the loan portfolio meets the standards contained therein.

With the exception of States, the certification should normally be in the form of a resolution passed by the grant recipient's governing board. Certification by State grantees should be by an authorized State official.

E. Plan Modifications

Approval of modifications to Part I of the Plan may be requested at any time the grant recipient or EDA determines that the Plan is either outdated relative to the current adjustment needs and objectives of the area or specific lending policies and/or requirements are impeding effective use of the RLF as a strategic financing tool. Prerequisites for EDA's consideration of proposed modifications to Part I of the Plan include the following:

1. When the modification request is based on a significant redirection of an area's economic adjustment strategy, it must be accompanied by a copy of the current strategy. The strategy submitted must:

- a. Have been prepared or reviewed and updated, as necessary and appropriate, within the last 12 months by the grant recipient or area organization responsible for its preparation and maintenance;
- b. Address, for the purposes of EDA, the same geographic/jurisdictional area covered by the original strategy, unless the eligible area has been/is being expanded as provided for by the terms and conditions of the grant;
- c. Include the information specified in EDA's current guidelines for preparing and documenting an economic adjustment strategy, including evidence of the continuing need for the RLF; and
- d. Provide sufficient evidence that the proposed modifications are necessary and justified.

2. When the proposed modification is designed to permit more effective use of RLF financing in support of its unchanged strategic objectives, the grant recipient must submit adequate written justification for the proposed change(s). Submission of a current adjustment strategy is not required.

3. Certification that the proposed revisions are consistent with EDA policy and do not violate the terms and conditions of the grant.

4. Certification that the purpose and scope of the RLF as a financing tool for supporting implementation of the area's economic adjustment strategy remain unchanged.

5. Certification that prudent management of the RLF assets would not be compromised.

Grant recipients funded prior to the effective date of this Manual are encouraged but not required, unless determined otherwise by EDA, to comply with the new RLF Plan format when modifying any part of their plan.

Operational procedures, as documented in Part II of the Plan, so long as consistent with EDA requirements and the terms and conditions of the grant award, may be modified with the approval of the grant recipient's governing board. A copy of any revisions to Part II should be submitted for the EDA file within 30 days of approval. For

grant recipients other than States, Plan modifications should be approved by resolution of the organization's governing board.

IX. DISBURSEMENT OF GRANT FUNDS

A. Pre-Disbursement Requirements

1. The grant recipient is required to provide evidence that it has fidelity bond coverage for persons authorized to handle funds under the grant award in an amount sufficient to protect the interests of EDA and the RLF. Such insurance coverage must exist at all times during the life of the RLF.

2. The grant recipient is required to provide a certification by an independent accountant familiar with the grant recipient's accounting system that its accounting system is adequate to identify, safeguard, and account for all RLF funds, including RLF Income.

3. The grant recipient is required to certify that the standard RLF loan documents necessary for lending are in place and that these documents have been reviewed by legal counsel for adequacy and compliance with the terms and conditions of the grant. The standard loan documents must include at a minimum, the following: Loan Application, Loan Agreement, Promissory Note, Security Agreement(s), Deed of Trust or Mortgage, and Agreement of Prior Lien Holder.

B. Disbursement Procedures

The grant recipient is required to draw grant funds electronically by the Automated Clearing House Electronic Funds Transfer (ACH/EFT) system. A grant recipient may request disbursements only at the time and in the amount immediately needed to close a loan or disburse funds to a borrower. RLF grant funds are considered to be made available to grant recipients on a reimbursement basis (as an obligation is incurred by the grant recipient at the time of loan approval and loan announcement). Grant funds should be requested only for immediate use, i.e., when the intent is to disburse the funds within 14 days of receipt. If grant funds are requested and the loan disbursement is subsequently delayed, a grant recipient may hold the funds up to 30 days from the date of receipt, but should return the funds if disbursement of the grant funds is unlikely within the 30 day period. Returned funds will be normally available to the grant recipient for future drawdown. When returning prematurely drawn funds, checks should identify on their face the name of the grantor agency—"EDA" followed by the grant award number and the words "Premature Draw." The grant recipient may also indicate, if a cover letter is sent, that a credit in the amount of the check is to be made to the grant award number for future drawdown. Checks should be submitted to: Economic

Development Administration, P.O. Box 100202, Atlanta, Georgia 30384.

As stated above, the nonfederal matching share must be disbursed either proportionately with the EDA grant funds or at a faster rate. Interest earned on prematurely drawn grant funds must be returned to EDA at least quarterly for deposit in the U.S. Treasury. (Note: Grantees may deduct and retain a portion of such earned interest for administrative expenses up to the maximum amounts allowed under either 15 CFR Part 24 or OMB Circular A-110 or its implementing Department regulation, as applicable). Returned interest payments should indicate on the face of the check "EDA" followed by grant award number and the word "Interest". Checks for interest should be submitted to the same Atlanta, Georgia address as above.

To request a grant disbursement by the ACH/EFT method, a grant recipient must submit a completed Request For Advance or Reimbursement, Standard Form 270 to the EDA Regional Office using the attached Special Instructions (Exhibit B) which are specific to RLF grants. Grant recipients may generally expect to have funds available for subsequent disbursement from five to ten working days after the EDA Regional Office receives the SF 270.

C. Principal Repayments During Grant Disbursement Phase

Principal repayments from active RLF loans that are received by the grant recipient must be placed immediately in the loan fund to be available for relending only. As each new loan is made, the grant recipient may request a disbursement of grant funds only for the difference, if any, between the amount of funds available for relending (from repayments of loan principal and RLF Income) and the amount of the new loan, less an amount for local matching funds as may be required to be disbursed concurrent with the grant (refer to Section V.B. for matching fund requirements). However, RLF Income received during the current period (as defined in Section VII.C.2.) may be held for the duration of the period to cover eligible administrative expenses, and need not be disbursed in order to draw additional grant funds.

D. Loan Closing/Disbursement Schedule

RLF loan activity must be sufficient to draw down grant funds in accordance with the prescribed time schedule for loan closings and disbursements to eligible RLF borrowers. Unless otherwise stated in the grant agreement, the time schedule requires that the initial round of lending (i.e., the grant disbursement phase) be completed within three (3) years of the grant award with no less than 50 percent of the grant funds, and

of the nonfederal matching share, disbursed within eighteen months and 80 percent within two years.

Should the grant recipient substantially fail to meet any of the prescribed deadlines, additional grant funds will not be disbursed unless (1) funds are needed to close and disburse funds on loans approved prior to the deadline and will be disbursed within 45 days of the deadline, (2) funds are needed to meet continuing disbursement obligations on loans closed prior to the deadline, or (3) EDA has approved a time schedule extension.

(Note: An approved loan is defined as a loan that has been approved by the RLF loan board but has not been closed. A loan is closed when the loan agreement and note have been signed by the borrower. The full amount of a loan may be disbursed to the borrower at the time of loan closing, or may be disbursed in installments and under conditions specified in the loan agreement.)

E. Time Schedule Extensions

Grant recipients are responsible for contacting EDA as soon as conditions become known that may materially affect their ability to meet any of the required disbursement deadlines. Except under the conditions described, a grant recipient is required to submit a written request for continued use of grant funds beyond the missed deadline. Extension requests must provide good reason for the delay and demonstrate that (1) the delay was unforeseen or generally beyond the control of the Recipient, (2) the need for the RLF still exists, (3) the current or planned use, and anticipated benefits of the RLF remain consistent with the current adjustment strategy and RLF Plan, and (4) achievement of a new proposed time schedule is reasonably possible and why no further delays are foreseen. EDA is under no obligation to grant a time extension, and in the event an extension is denied, EDA will deobligate (terminate) all or part of the unused portion of grant.

By law, grant funds remain available to EDA for disbursement only until September 30 of the fifth year after the fiscal year of the grant award. No time extensions will be granted beyond that time and any undisbursed funds remaining will be deobligated.

X. CAPITAL UTILIZATION STANDARD

A. Definition

During the revolving phase, grant recipients are expected to manage their repayment and lending schedules to maximize the amount of capital loaned out or committed at all times. Under normal circumstances, at least 75 percent of an RLF's capital should be in use. [RLF Income earned during the current period (as defined in Section VII.C.2) is not included as RLF capital.] EDA may

recognize exceptions for RLFs whose Plan calls for making loans that are large relative to the size of the capital base. RLFs with capital bases in excess of \$4 million are expected to maintain a proportionately higher percentage of their funds loaned out. The percentage will be determined by EDA on a case-by-case basis.

When the percentage of capital loaned out falls below the applicable standard, the dollar amount of the funds equivalent to the difference between the actual percentage of capital loaned out and the standard is referred to as "excess funds."

B. Deviation

In the event that there are excess funds at the time a semiannual report is due, the grant recipient must submit an explanation of the situation with the report, and if there is a significant deviation from the standard, as determined by EDA, the grant recipient must describe the remedial action to be taken.

C. Sequestration of Excess Funds

At any time subsequent to a second consecutive report showing that the applicable standard has not been met, EDA may require the grant recipient to deposit excess funds in an interest bearing account; that portion of the interest earned on that account, attributable to the EDA grant, will be remitted to the U.S. Treasury. EDA approval will be required to withdraw sequestered funds.

D. Persistent Noncompliance

EDA will normally give the grant recipient a reasonable period of time to loan the excess funds and achieve the standard. However, when a grant recipient fails to achieve the applicable standard after a reasonable period of time, as determined by EDA, the grant will be subject to sanctions for suspension and/or termination as described in Section XII of this Manual.

XI. MONITORING

EDA monitors grant recipients for compliance with the Terms and Conditions of the grant, for performance against national norms and individual portfolio standards, and for the contribution of the RLF to the area's economic adjustment process. Monitoring and performance assessments are based on periodic reports submitted by the grant recipients, organizational and Federal audits, and site visits by EDA staff.

A. Reports

1. *Grant Status Reports:* Grant recipients are required to submit standard Federal grant status reports to EDA during the grant disbursement phase as specified in the Terms and Conditions of the grant agreement.

These include: (a) Standard Form 270, Request for Advance or Reimbursement, which is submitted each time a grantee needs to draw Federal funds (see Section IX.B. and Exhibit B); and (b) Standard Form 272, Federal Cash Transactions Report (Exhibit C), which is due within 15 days following the end of each calendar quarter and shows the status of grant funds. Failure to submit a Standard Form 272, when due, will prevent a grant recipient from obtaining funds until the form is submitted.

2. *Financial and Performance Reports:* All grant recipients are required to complete and submit Financial and Performance Reports (Exhibit D) semiannually unless otherwise notified by EDA.

a. *Initial Report:* For grants, other than recapitalizations, awarded between October 1, and March 31, the initial report due date is the following October 31. For grants awarded between April 1 and September 30, the initial report due date is the following April 30.

b. *Subsequent Reports:* After the initial report, the semiannual report is due on October 31, for the period of loan activity ending September 30, and April 30, for the period ending March 31.

Generally, RLF grant recipients will be required to submit reports to the EDA Regional Office every six months for a minimum of one year after disbursement of all grant funds, after which a grant recipient may be eligible for "graduation" to a shorter, annual reporting format (Exhibit E). Grant recipients must request this in writing. Recipients of recapitalization grants shall report on the full amount of their RLF funds in each subsequent semiannual or annual report submitted.

3. *Annual Reports:* For grant recipients graduated to an annual reporting schedule, the report covers the twelve month period ending September 30, and is due October 31. The annual reporting requirement continues through the life of an RLF unless EDA determines that more frequent or detailed reports are needed for closer monitoring of grant violations or other problems. Note that the annual report requires documentation of capital utilization at semiannual intervals pursuant to the requirements of Section X.

4. *Special Reports:* Special reports to enable EDA monitoring of compliance issues arising from audits, site visits, or other reviews may be requested from the grant recipient in writing on a case by case basis.

First time grant recipients may be required to submit periodic reports on their progress in initiating RLF activity, prior to the due date of the first semiannual report.

B. Audits

Grant recipients are subject to the following audit requirements for the duration of the RLF.

1. In accordance with the terms and conditions of the grant award, the grant recipient shall arrange for a Single Audit as referenced in the RLF Audit Guidelines and OMB Circular A-133. Such audits should be conducted by an independent auditor who meets the general standards specified in generally accepted government auditing standards. With the exception of newly awarded grants and limited circumstances described in the RLF Audit Guidelines, the majority of RLF grant recipients will require an annual audit.

Pursuant to the Single Audit Act Amendments of 1996 (P.L. 104-156), and OMB Circular A-133, as codified in DOC Regulations found at 15 CFR Part 29, audits are required of all State, local government and non-profit corporation RLF grant recipients that expended total Federal awards of at least \$300,000 in a given fiscal year. For all RLF grants, the calculation of RLF expenditures will include the beginning balance of all outstanding loans plus the current year's loan and loan-related expenditures. The cost principles to be followed are contained in OMB Circulars A-21, A-87 or A-122, as applicable.

Audit requirements for RLF's are summarized in the EDA RLF Audit Guidelines which should be made available to the auditor prior to the audit engagement. Failure to comply with these requirements could result in an unacceptable audit.

2. The U.S. Department of Commerce Office of Inspector General (OIG) may audit, inspect, or investigate an RLF grant at any time.

C. Site Visits

EDA will periodically schedule site visits to review the grant recipient's operating procedures, monitor progress and evaluate the effectiveness of the RLF in supporting the area's economic adjustment process and strategic objectives.

XII. NONCOMPLIANCE WITH THE GRANT TERMS

A. Suspension

EDA may suspend RLF lending activity when EDA determines that a grant recipient has failed to comply with the grant terms. Before suspending a grant, EDA may give the grant recipient a reasonable period of time in which to take the necessary corrective action to comply with the grant terms. However, should it appear that the grant recipient had not taken or will not take the necessary action, and/or that continued operation of the RLF would place the assets at risk, EDA may suspend the grant immediately. Upon suspension, the grant recipient will be prohibited from any new lending activity, although normal loan servicing and collection efforts will continue. In addition, the grant recipient may be subject to restrictions on the use of RLF Income and specific

actions to protect the RLF assets may be required.

In the event that the compliance problems are not resolved during the suspension period, EDA will attempt to resolve the issues through means including working with the Recipient to identify a successor to assume responsibility for administering the RLF in accordance with the terms of the original grant agreement. If issues cannot be resolved, EDA will initiate proceedings to terminate the grant for cause.

B. Termination for Cause

EDA may terminate an RLF grant for cause with or without prior suspension of lending activity.

C. Partial Termination

When EDA determines, after a reasonable period of time, that a grant recipient is unable or unwilling to use the full amount of the grant funds or of the RLF capital and RLF Income thereby generated, EDA may partially terminate the grant if EDA determines that the remaining capital is sufficient to support continuation of an effective RLF operation.

When a grant recipient fails to complete the initial round of lending in the time schedule provided in the grant agreement, the unused grant funds may be deobligated and the grant award amended to reflect the reduced grant amount. The nonfederal matching share will be expected to remain in the RLF unless otherwise specified in the grant agreement or agreed to in writing by EDA.

Grant recipients in the revolving phase who persistently fail to make maximum use of the available RLF capital, as defined by the applicable capital utilization standard in Section X, will be required to return excess funds, in an amount determined by EDA, to the U.S. Treasury. This amount will not be greater than EDA's proportionate share of the excess funds sequestered at the time. The grant award will be amended to reflect the reduced amount of EDA's participation.

XIII. TERMINATION FOR CONVENIENCE

A grant recipient has the right to request termination for convenience of the grant, in whole, or in part, at any time. Termination is undertaken without prejudice to the grant recipient upon agreement of both parties that the purpose of the grant would not be served by further expenditure of funds, and in the case of a partial termination, EDA determines that sufficient funds remain to permit an effective RLF operation. The Federal share of the funds must be returned to the U.S. Treasury as described below in Section XIV.

XIV. RECOVERY OF EDA INTEREST IN THE RLF ASSETS

In case of termination, for cause or convenience, EDA has the responsibility, on behalf of the Federal Government, to recover its fair share of the value of the RLF assets consisting of cash, receivables, personal and real property, and notes or other financial instruments developed through use of the funds. EDA's fair share is the amount computed by applying the percentage of EDA participation in the total capitalization of the RLF to the current fair market value of the assets thereof; provided that with EDA's approval the Recipient may use for other economic development purposes that portion of such RLF property which EDA determines is attributable to the payment of interest on RLF loans and not used by the Recipient for administrative or other allowable expenses. In addition, EDA has the right to compensation, over and above its share of the current fair market value of the assets, when it is determined that the value of such assets has been reduced by the improper/illegal use of grant funds.

XV. SALE OR SECURITIZATION OF LOANS

Grant recipients may, with EDA's prior written consent, further the objectives of the RLF through the sale of loans or securitization of the loan portfolio to generate money to be used for additional loans as part of the RLF. A grant recipient contemplating such an action is advised to consult with EDA prior to development of a formal proposal.

In the event of the sale, collection, or liquidation of loans, any proceeds, net of repaid principal and reasonable administrative costs incurred, up to the amount of the outstanding loan principal, must be returned to the RLF for relending. Any net proceeds from loan sales above the outstanding loan principal is considered RLF Income and must either be added to the RLF capital base for lending or used to cover eligible costs for administering the RLF in accordance with the rules for use of RLF Income.

XVI. APPENDIX

The following reference materials and required or sample reporting formats are available from EDA:

OMB Circulars and CFR'S (List of Reprints)

- 15 CFR Part 24, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments
- OMB Circular A-87, Cost Principles for State and Local Governments
- 15 CFR Part 29a, Audit Requirements for State and Local Governments

Economic Development Administration, Commerce

Pt. 308, App. C

15 CFR Part 29b, Audit Requirements for Institutions of Higher Education and Other Nonprofit Organizations

OMB Circular A-133, Audits of States, Local Governments and Nonprofit Organizations

OMB Circular A-110, Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations Uniform Administrative Requirements

OMB Circular A-122, Cost Principles for Nonprofit Organizations

OMB Circular A-21, Cost Principles for Educational Institutions

48 CFR Part 31, Contract Cost Principles and Procedures

15 CFR Part 26, Governmentwide Debarment and Suspension and Governmentwide Requirements for Drug Free Workplace

EDA Reference Materials and Reporting Formats

EXHIBIT A: RLF Income and Expense Statement with Instructions

EXHIBIT B: Request for Advance or Reimbursement (SF-270) with EDA Special Instructions

EXHIBIT C: Federal Cash Transaction Report (SF-272)

EXHIBIT D: Semiannual Report for RLF Grants with Instructions

EXHIBIT E: Annual Report for RLF Grants with Instructions

EXHIBIT A

RLF INCOME AND EXPENSE STATEMENT

For The (Most Recent) 12 Month
Period Ended: _____

| | Most Recent Period | Prior Period |
|---|--------------------|--------------|
| 1. RLF INCOME | \$ | \$ |
| 2. EXPENSES CHARGED TO RLF INCOME | | |
| a. Employee Salaries | \$ | \$ |
| b. Employee Fringe Benefits | \$ | \$ |
| c. RLF-related Travel | \$ | \$ |
| d. Loan Processing/Closing Costs | \$ | \$ |
| e. Professional Services | \$ | \$ |
| f. Marketing | \$ | \$ |
| g. RLF Staff Training | \$ | \$ |
| h. Equipment - Rental | \$ | \$ |
| - Acquisition | \$ | \$ |
| i. Space (rent) | \$ | \$ |
| j. Audit | \$ | \$ |
| k. Indirect Costs | \$ | \$ |
| l. Other (Specify) | \$ | \$ |
| 3. TOTAL EXPENSES (sum 2.a thru 2.l) | \$ | \$ |
| 4. NET RLF INCOME (1 minus 3) | \$ | \$ |
| 5. Cumulative NET RLF INCOME | \$ | \$ |
| 6. EXPENSES as % of RLF INCOME (3/1) | % | % |
| 7. For the current 12 month period, provide an estimate of projected RLF Income and the percentage expected to be used for RLF administrative expenses. Projected RLF Income: \$ _____ % for Administration: _____ % | | |
| 8. On a separate page, list all personnel positions which were funded partially or in full with RLF Income for the most recent period only; list the aggregate dollar amount for salaries and fringe benefits for each listed position, and the amount and percent which were funded by RLF Income. | | |

CERTIFICATION OF AUTHORIZED REPRESENTATIVE (designated RLF Administrator or Chief Financial Officer): I certify that the above information and any attachments thereto are complete and accurate to the best of my knowledge.

By: _____ Date: _____

Name and Position: _____

EXHIBIT A (BACK)—INSTRUCTIONS FOR RLF
INCOME AND EXPENSE STATEMENT
The RLF INCOME AND EXPENSE STATE-
MENT is to be used by recipients of revolv-

ing loan fund (RLF) grants provided by the
Economic Development Administration
(EDA), U.S. Department of Commerce. The
Statement is to be completed for each year

in which a grantee uses income generated from RLF activities to pay for RLF administrative expenses. It should be completed within 90 days of a grant recipient's fiscal year end or September 30. The period will be selected by the grant recipient; once selected, it may not be changed without the prior approval of EDA. Instructions for submitting the Statement are included in the EDA Administrative Manual, Section VII. Expenses charged to RLF income sources must be eligible under the terms of the grant and must comply with applicable OMB cost principles and the EDA RLF Audit Guide. For grantees completing the Statement for the first time, or which did not charge any expenses against RLF income sources in a prior period, complete only the second column marked "Most Recent Period" and answer questions 7. And 8.

Except for the items explained below, all items on the Statement are self-explanatory or are adequately addressed in the RLF Audit Guide and applicable OMB Cost Principles.

Item and Entry

- 1 "RLF INCOME" includes all interest earned on outstanding loan principal, interest earned on accounts holding idle RLF funds, and loan fees and other loan-related earnings.

2d Enter the amount of grantee out-of-pocket costs which were necessary to process and close RLF loans. These costs may include such costs for credit reports, title insurance, Uniform Commercial Code searches, filing fees, appraisals, etc., which are recorded in the grantee's accounting records. Any costs not recorded in the grantee's accounting records, e.g., those paid directly by a borrower to a third party, or those that were netted against loan fees (thereby reducing reported income), need not be reported here.

2g Enter the costs charged to RLF Income for RLF-related training for employees involved in RLF operations. These costs may include training materials, textbooks, tuition and registration fees. Any training-related travel costs should be reported in Item 2c.

5 "Cumulative NET RLF INCOME" includes all RLF Income earned during the life of the RLF that was not used for RLF administrative expenses. The amount reported should be inclusive of the NET RLF INCOME reported in Item 4. (The Cumulative NET RLF INCOME for the most recent period should equal the sum of the amounts in Item 5 for the prior period and in Item 4 for the most recent period.

EXHIBIT B

| | | | | | |
|---|---|---|---|--|-------------|
| REQUEST FOR ADVANCE OR REIMBURSEMENT (See Instructions on back) | | OMB Approval NO. 0348-0004 | | Page | of Pages |
| | | 1. TYPE OF PAYMENT REQUESTED A. "X" ONE OR BOTH BOXES <input type="checkbox"/> Advance <input type="checkbox"/> Reimbursement b. "X" the applicable box <input type="checkbox"/> Final <input type="checkbox"/> Partial | 2. BASIS OF REQUEST <input type="checkbox"/> CASH. <input type="checkbox"/> ACCRUAL | | |
| 3. FEDERAL SPONSORING AGENCY AND ORGANIZATION ELEMENT TO WHICH THIS REPORT IS SUBMITTED | | 4. FEDERAL GRANT OR OTHER IDENTIFYING NUMBER ASSIGNED BY FEDERAL AGENCY | | 5. PARTIAL PAYMENT REQUEST NUMBER FOR THIS REQUEST | |
| 6. EMPLOYER IDENTIFICATION NUMBER | 7. RECIPIENT'S ACCOUNT NUMBER OR IDENTIFYING NUMBER | 8. PERIOD COVERED BY THIS REQUEST | | | |
| | | FROM (month, day, year) | | TO (month, day, year) | |
| 9. RECIPIENT ORGANIZATION NAME NUMBER AND STREET CITY, STATE and ZIP CODE | | 10. PAYEE (where check is sent is different than item 9) NAME NUMBER AND STREET CITY, STATE and ZIP CODE | | | |
| 11. COMPUTATION OF AMOUNT OF REIMBURSEMENTS/ADVANCES REQUESTED | | | | | |
| PROGRAMS/FUNCTIONS/ACTIVITIES | (a) | (b) | (c) | TOTAL | |
| a. Total Program - Outlays to Date (as of date) | \$ | \$ | \$ | \$ | |
| b. Less: Cumulative program income | | | | | |
| c. Net program outlays (Line a minus line b) | | | | | |
| d. Estimated net cash outlays for advance period | | | | | |
| e. Total (Sums of lines c & d) | | | | | |
| f. Non-Federal share of amount on line e. | | | | | |
| g. Federal share of amount on line e. | | | | | |
| h. Federal payments previously requested | | | | | |
| i. Federal share now requested (Line g minus line h) | | | | | |
| j. Advances required by month, when requested by Federal grantor Agency for use in Making prescheduled advances | 1st month 2nd month 3rd month | | | | |
| 12. ALTERNATE COMPUTATION FOR ADVANCES ONLY | | | | | |
| a. Estimated Federal cash outlays that will be made during period covered by the advance | | | | \$ | |
| b. Less: Estimated balance of Federal cash on hand as of beginning of advance period | | | | | |
| c. Amount requested (Line a minus line b) | | | | \$ | |

AUTHORIZED FOR LOCAL REPRODUCTION

(Continued on Reverse)

 STANDARD FORM 270 (REV. 2-62)
 PRESCRIBED BY OFFICE OF MANAGEMENT AND BUDGET
 C/F NO. A-102 AND B-110

EXHIBIT B

CERTIFICATION

I certify that to the best of my knowledge and belief the data on the reverse are correct and that all outlays were made in accordance with the grant conditions or other agreement and that payment is due and has not been previously requested.

Signature of Authorized Certifying Official

Date Request Submitted

Typed or Printed Name and Title

Telephone (Area Code, Number, Extension)

This Space for Agency Use

Public reporting burden for this collection of information is estimated to average 60 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the OFFICE of Management and Budget, Paperwork Reduction Project (0348-0004), Washington, DC 20503.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.

INSTRUCTIONS

Please type or print legibly. Items 1, 3, 5, 9, 10, 11c, 11e, 11f, 11g, 11i, 12 and 13 are self explanatory; specific instructions for other items are as follows:

- | Item | Entry | | |
|-------|--|-----|---|
| 2. | Indicate whether request is prepared on cash or accrued expenditure basis. All requests for advances shall be prepared on a cash basis. | 11a | Enter in "as of date", the month, day, and year of the ending of the accounting period to which this amount applies. Enter program outlays to date (net of refunds, rebates, and discounts), in the appropriate columns. For requests prepared on a cash basis, outlays are the sum of actual cash disbursements for goods and services, the amount of indirect expenses charged, the value of in-kind contributions applied, and the amount of cash advances and payments made to subcontractors and subrecipients. For requests prepared on an accrued expenditure basis, outlays are the sum of the actual cash disbursements, the amount of indirect expenses incurred, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received and for services performed by employees, contracts, subgrantees and other payees. |
| 4 | Enter the Federal grant number, or other identifying number assigned by the Federal sponsoring agency. If the advance or reimbursement is for more than one grant or other agreement, insert N A; then, show the aggregate amounts. On a separate sheet, list each grant or agreement number and the Federal share of outlays made against the grant or agreement. | 11b | Enter the cumulative cash income received to date, if requests are prepared on a cash basis. For requests prepared on an accrued expenditure basis, enter the cumulative income earned to date. Under either basis, enter only the amount applicable to program income that was required to be used for the project or program by the terms of the grant or other agreement. |
| 6 | Enter the employer identification number assigned by the U.S. Internal Revenue Service, or the FICE (institution) code if requested by the Federal agency. | 11d | Only when making requests for advance payments, enter the total estimated amount of cash outlays that will be made during the period covered by the advance. |
| 7 | This space is reserved for an account number or other identifying number that may be assigned by the recipient. | 13 | Complete the certification before submitting this request. |
| 8 | Enter the month, day and year for the beginning and ending of the period covered in this request. If the request is for an advance or for both an advance and reimbursement, show the period that the advance will cover. If the request is for reimbursement, show the period for which the reimbursement is requested. | | |
| Note: | The Federal sponsoring agencies have the option of requiring recipients to complete items 11 or 12, but not both. Item 12 should be used when only a minimum amount of information is needed to make an advance and outlay information contained in item 11 can be obtained in a timely manner from other reports. | | STANDARD FORM 270 BACK (Rev. 2-92) |
| 11 | The purpose of the vertical columns (a), (b), and (c), is to provide space for separate cost breakdowns when a project has been planned and budgeted by program, function or activity. If | | |

- | Item | Entry |
|------|---|
| | additional columns are needed, use as many additional forms as needed and indicate page number in space provided in upper right; however, the summary totals of all programs, functions, or activities should be shown in the "total" column on the first page. |

EXHIBIT B (REVISED 12/98)—SPECIAL INSTRUCTIONS FOR COMPLETION OF STANDARD FORM 270 FOR EDA REVOLVING LOAN FUND GRANTS

These instructions apply to revolving loan fund (RLF) grants funded by the Economic Development Administration (EDA), U.S. Department of Commerce, under Section 209 of the Public Works and Economic Development Act of 1965, as amended. RLF grant recipients are required to use Standard Form 270 to draw grant funds when needed to disburse to RLF borrowers. Funds may be drawn only for immediate use (i.e., when the intent is to disburse the funds within 14 days of receipt), and only to the extent that the recipient does not have funds on hand from loan repayments and certain RLF income sources to cover the proposed disbursement request. (See below and EDA's RLF Administrative Manual, Section IX, for further details.) Grant funds not disbursed within 30 days of receipt must be returned to EDA. Items 1b, 3, 9, 11c, 11e, and 11i are self-explanatory; specific instructions for other items follow:

Item and Entry

- 1a Indicate whether the request is for a reimbursement or an advance. (Note the RLF disbursements are normally considered reimbursement as a reimbursable obligation is created at the time of loan approval. A request for an advance may be requested under special circumstances.
- 2 Disregard.
- 4 Enter the Federal grant number or other identifying number assigned by EDA. If the reimbursement or advance is for more than one grant or other agreement, insert N/A; then show the aggregate amounts. On a separate sheet, list each grant or agreement number and the Federal share of outlays made against the grant or agreement.
- 5 Enter in numerical order the number of this disbursement request. Begin with the number "1" for each new grant.
- 6 Enter the employer identification number assigned by the US Internal Revenue Service, or the FICE (institution) code if requested by EDA.
- 7 This space is reserved for an account number or other identifying number that may be assigned by the grant recipient.
- 8 Disregard.
- 10 Enter "ACH/EFT" for funds disbursement by the Automated Clearing House Electronic Funds Transfer System. For further details, refer to Section E.02 of the RLF Standard Terms and Conditions.
- 11 The purpose of the vertical columns (a), (b), and (c) is to provide space for separate cost breakdowns when a project has been planned and budgeted by program, function, or activity. If additional col-

umns are needed, use as many additional forms as needed and indicate the page number in the space provided in upper right; if more than one column is used, the summary totals of all programs, functions, or activities should be shown in the "total" column on the first page.

- 11a Enter in "as of date", the month, day and year of the ending of the accounting period to which this amount applies. Enter the amount of cumulative outlays for RLF loans from the following sources: EDA RLF grant funds, matching funds, and program income (defined in Section VII.A of the RLF Administrative Manual).

Include actual, pending (previous outlays requests that have not yet been disbursed) and proposed (those proposed under this request) outlays. For recapitalized RLF's—those where a subsequent EDA RLF grant was made to the same recipient—treat cumulative outlays as beginning with the inception of the RLF.

- 11b Cumulative Program Income, as defined below, must be used before or concurrent with the disbursement of new grant funds (pursuant to Section IX of the RLF Administrative Manual). Cumulative Program Income is a net figure computed, as follows:

+Cumulative Principal Repaid*
 +Cumulative RLF Income Received**
 – Cumulative Administrative Cost Expensed to RLF Income***

Footnotes:

*This is the cumulative RLF loan principal that has been repaid from inception of the RLF.

**This includes all RLF Income earned and received from inception of the RLF. Current period RLF Income on hand may be excluded from this amount if any portion of it is anticipated to be used during the remainder of the current period. Note that failure to exclude these funds here will increase Cumulative Program Income (line 11b) which will lower the amount of grant funds to be requested for disbursement (line 11i). Any RLF Income available at the end of a period is required to be added to the RLF capital base for lending.

***Enter all administrative costs Expensed to RLF Income from Inception of the RLF.

Definitions

Program Income—is the sum of all RLF principal repayments plus RLF Income (defined below).

RLF Income—includes all RLF-generated income from loan fees, interest earned on loans and on accounts holding idle RLF funds, and other loan-related earnings.

Period—refers to the 12-month reporting period by each grant recipient; it may end on

either September 30 or the grantee's fiscal year-end date. (Refer to Section VII.C.2. of RLF Administrative Manual.

11d Enter "0" unless an advance of grant funds is being requested—see Item 1a above.

11f Enter the total amount of the matching funds previously expended plus matching funds to be disbursed as part of this request (and any previous pending request, if applicable). When calculating this amount, note that the matching funds amount in 11f as a percent of the amount on line 11c may not be less than the percentage relationship between the aggregate of matching funds and of total project costs indicated in the grant award(s). Matching funds must be expended either before or at least proportionately with EDA grant funds.

11g Enter the EDA share of the amount on line 11e. This should be the difference between the amounts on lines 11e and 11f.

11h Enter the amount of EDA funds previously requested. This should be equal to the amount reported in Item 11g of the previous SF 270 submitted by the recipient.

12 Disregard.


13 In the space indicated for "agency use" or on a separate page, provide the following disbursement information:

a. Indicate whether the RLF identified in Section 4 is an "initial" or "recapitalization" RLF grant. If an initial grant, show the EDA grant funds expended as a percent of total expenditures by dividing the amount reported in Item 11g by the amount reported in Item 11e. If a recapitalization grant, show both the EDA and the matching fund dollar outlays (including actual and proposed outlays) for the grant disbursement; also show the percentage of EDA dollar outlays to total dollar outlays for the grant under disbursement.

b. If any previously requested grant funds have been received but not disbursed, list the date of receipt and the amount remaining to be disbursed. If not applicable, type "NA".

c. List the RLF borrowers and the respective RLF dollar amounts anticipated to be disbursed under this request.

EXHIBIT C

| FEDERAL CASH TRANSACTIONS REPORT | | OMB APPROVAL NO. 0348-0003 | |
|--|--|--|---|
| (See instructions on the back. If report is for more than one grant or assistance agreement, attach completed Standard Form 272-A.) | | 1. Federal sponsoring agency and organizational element to which this report is submitted. | |
| | | | |
| 2. RECIPIENT ORGANIZATION Name: Number and Street: City, State and Zip Code: | | 4. Federal grant or other identification number. | 5. Recipient's account number or identifying number. |
| | | 6. Letter of credit number. | 7. Last payment voucher number. |
| | | Give total number for this period. | |
| | | 8. Payment Vouchers credited to your account. | 9. Treasury checks received (whether or not deposited). |
| | | 10. PERIOD COVERED BY THIS REPORT | |
| 3. FEDERAL EMPLOYER IDENTIFICATION NO.  | | From (month, day, year) | TO (month, day, year) |
| 11. STATUS OF FEDERAL CASH (See Specific Instructions On Back) | a. Cash on hand beginning of reporting period | | \$ |
| | b. Letter of credit withdrawals | | |
| | c. Treasury check payments | | |
| | d. Total receipts (Sum of lines b and c) | | |
| | e. Total cash available (Sum of lines a and d) | | |
| | f. Gross disbursements | | |
| | g. Federal share of program income | | |
| | h. Net disbursements (Line f minus line g) | | |
| | i. Adjustments of prior periods | | |
| | j. Cash on hand end of period | | \$ |
| 12. The AMOUNT SHOWN ON LINE 11j, ABOVE, REPRESENTS CASH REQUIREMENTS FOR THE ENSUING DAYS | | 13. OTHER INFORMATION | |
| | | a. Interest income | \$ |
| | | b. Advances to subgrantees or subcontractors | \$ |
| 14. REMARKS (Attach additional sheets of plain paper, if more space is required.) | | | |
| 15. CERTIFICATION | | | |
| I certify to the best of my knowledge and belief that this report is true in all aspects and that all disbursements have been made for the purpose and conditions of the grant or agreement. | AUTHORIZED CERTIFYING OFFICIAL | SIGNATURE | DATE REPORT SUBMITTED |
| | | TYPED OR PRINTED NAME AND TITLE | TELEPHONE ((Area Code, Number, Extension)) |
| THIS SPACE FOR AGENCY USE | | | |

NSN 7540-01-016-5435

STANDARD FORM 372 (REV. 3-92)
PRESCRIBED BY OFFICE OF MANAGEMENT AND BUDGET

INSTRUCTIONS

Public reporting burden for this collection of information is estimated to average 120 minutes per response, including timer for reviewing instructions, searching existing data sources, gathering and maintaining the data

needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to the Office of Management and Budget, Paperwork Reduction Project (0348-0003), Washington, DC 20503.

Please *do not* return your completed form to the Office of Management and Budget, send it to the address provided by the sponsoring agency.

Please type of print legibly, Items 1, 2, 8, 9, 10, 11d, 11e, 11h, and 15 are self explanatory, specific instructions for other items are as follows:

Item and Entry

3 Enter employer identification number assigned by the U.S. Internal Revenue Service or the FIC (institution) code.

If this report covers more than one grant or other agreement, leave items 4 and 5 blank and provide the information on Standard Form 272-A, Report of federal Cash Transactions—Continued; otherwise;

4 Enter Federal grant number, agreement number, or other identifying numbers if requested by sponsoring agency.

5 This space reserved for an account number or other identifying number that may be assigned by the recipient.

6 Enter the letter of credit number that applies to this report. If all advances were made by Treasury check, enter "NA" for not applicable and leave items 7 and 8 blank.

7 Enter the voucher number of the last letter-of-credit payment voucher (Form TUS 5401) that was credited to your account.

11a Enter the total amount of Federal cash on hand at the beginning of the reporting period including all of the Federal funds on deposit, imprest funds, and undeposited Treasury checks.

11b Enter total amount of Federal funds received through payment vouchers (Form TUS 5401) that were credited to your account during the reporting period.

11c Enter the total amount of all Federal funds received during the reporting period through Treasury checks, whether or not deposited.

11f Enter the total Federal cash disbursements, made during the reporting period, including cash received as program income. Disbursements as used here also in-

clude the amount of advances and payments less refunds to subgrantees or contractors, the gross amount of direct salaries and wages, including the employee's Share of benefits if treated as a direct cost, interdepartmental charges for supplies and services, and the amount to which the recipient is entitled for indirect costs.

11g Enter the Federal share of program income that was required to be used on the project or program by the terms of the grant or agreement.

11i Enter the amount of all adjustments pertaining to prior periods affecting the ending balance that have not been included in any lines above. Identify each grant or agreement for which adjustment was made, and enter an explanation for each adjustment under "Remarks". Use plain sheets of paper if additional space is required.

11j Enter the total amount of Federal cash on hand at the end of the reporting period. This amount should include all funds on deposit, imprest funds, and undeposited funds (line 3, less line h, plus or minus line i).

12 Enter the estimated number of days until the cash on hand, shown on line 11j, will be expended. If more than three days cash requirements are on hand, provide an explanation under "Remarks" as to why the drawdown was made prematurely, or other reasons for the excess cash. The requirement for the explanation does not apply to prescheduled or automatic advances.

13a Enter the amount of interest earned on advances of Federal funds but not remitted to the Federal agency. If this includes any amount earned and not remitted to the Federal sponsoring agency for over 60 days, explain under "Remarks". Do not report interest earned on advances to States.

13b Enter amount of advance to secondary recipients included in item 11h.

14 In addition to providing explanations as required above, give additional explanation deemed necessary by the recipient and for information required by the Federal sponsoring agency in compliance with governing legislation. Use plain sheets of paper if additional space is required.

SEMIANNUAL REPORT FOR EDA-FUNDED RLF GRANTS

| Grantee Name: | | Period Ending: | | |
|--|----------|----------------------|----------------------------------|------------------|
| Project No.: | | Contact Person: | | |
| | | Phone: | | |
| PART I: PORTFOLIO STATUS (000'S) | | | | |
| A. Status of Direct Loans | | | | |
| | (1) # | (2) RLF \$ Loaned | (3) RLF Principal Outstanding | |
| 1. Total Loans Made | | \$ | \$ | |
| 2. Fully Repaid | | \$ | \$ | |
| 3. Current | | \$ | \$ | |
| 4. Delinquent (<60 Days) | | \$ | \$ | |
| 5. In Default (>60 Days) | | \$ | \$ | |
| 6. Total Active Loans (Add lines 3, 4 & 5) | | \$ | \$ | |
| 7. Total Written Off | | \$ | \$ | |
| | | | (Amount Lost) | |
| B. Status of Loan Guarantees: | | | | |
| | # | RLF\$ Reserved | Total Amount Guaranteed | Current Exposure |
| 1. Total Loans Guaranteed | | \$ | \$ | |
| 2. Fully Repaid | | \$ | \$ | |
| 3. Current | | \$ | \$ | \$ |
| 4. Delinquent (<60 Days) | | \$ | \$ | \$ |
| 5. In Default (>60 Days) | | \$ | \$ | \$ |
| 6. Total Active Guarantees (Add lines 3, 4 & 5) | | \$ | \$ | \$ |
| 7. Total Written Off | | \$ | \$ | \$ |
| | | | | (Amount Lost) |

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PART II: PORTFOLIO SUMMARY

A. Summary of Loan Activities: Provide information below on **Total Loans** and **Active Loans** closed to date. This section provides an overview of the RLF's Progress in Meeting program and grant objectives as well as identifying results of **Core Performance Measures** outlined in Section F.01. of the RLF Standard Terms and Conditions. It also shows trends by comparing the total and active loan portfolios.

| | Total Loans | Active Loans |
|--|-------------|--------------|
| 1. # RLF Loans: | | |
| 2. RLF \$\$ Loaned: | \$ | \$ |
| 3. Non-RLF \$\$ Leveraged by RLF: | | |
| a. Private | \$ | \$ |
| b. Other | \$ | \$ |
| c. Total Leveraged \$\$ (a + b) | \$ | \$ |
| 4. Total Project Financing (2 + 3c) | \$ | \$ |
| 5. Private Sector Jobs: | | |
| a. Created (Actual) | | |
| b. Saved | | |
| c. Actual + Saved (a + b) | | |
| 6. RLF \$\$ Loaned for Fixed Assets: | \$ | \$ |
| 7. RLF \$\$ Loaned for Working Capital: | \$ | \$ |
| 8. RLF \$\$ Loaned for: | | |
| a. Start-up | \$ | \$ |
| b. Expansion | \$ | \$ |
| c. Retention | \$ | \$ |
| 9. RLF \$\$ Loaned for: | | |
| a. Industrial | \$ | \$ |
| b. Commercial | \$ | \$ |
| c. Service | \$ | \$ |
| 10. RLF \$\$ Loaned to Minority Businesses: | \$ | \$ |
| 11. RLF \$\$ Loaned to Women-Owned Businesses: | \$ | \$ |
| 12. Other Targets (Specify): | \$ | \$ |

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B. Comparison of RLF Portfolio to RLF Plan: In column one below, fill in the spaces by providing information from the "Targeting", "Standards" and "Financing" sections of the RLF Plan. If an item is not included in the RLF Plan, and therefore not applicable, indicate this by placing N/A in column one. In columns two and three, use the figures obtained in Part II. A. above to compute the ratios and percentages for Total and Active Loans, respectively. Formulas for the computations are indicated in the brackets next to each item. Discuss any significant deviations between columns one and two.

| | RLF Plan | | Total Loans | | Active Loans | |
|------------------------------------|----------|---|-------------|---|--------------|---|
| 1. Cost per Job (A2/A5c) | \$ | | \$ | | \$ | |
| 2. Non-RLF Leverage Ratios: | | | | | | |
| a. Private (A3a/A2) | : | | : | | : | |
| b. Private & Other (A3c/A2) | : | | : | | : | |
| 3. % Working Capital Loans (A7/A2) | | % | | % | | % |
| 4. % Loans in Eligible Target Area | 100 | % | | % | | % |
| 5. RLF Portfolio Targeting | | | | | | |
| a. % Start-ups (A8a/A2) | | % | | % | | % |
| b. % Industrial (A9a/A2) | | % | | % | | % |
| c. % Minority Owned (A10/A2) | | % | | % | | % |
| d. % Women-Owned (A11/A2) | | % | | % | | % |
| e. % Other (A12/A2) | | % | | % | | % |

PART III: PORTFOLIO FINANCIAL STATUS**A. RLF Funding Sources**

| | | |
|-----------------------------------|----|--|
| 1. EDA | \$ | |
| 2. Grantee | \$ | |
| 3. Other - Specify: | \$ | |
| 4. Total RLF Funding (sum of 1-3) | \$ | |

B. Program Income Earned to Date:

| | | |
|---|----|--|
| 5. Interest Earned on Loans: | \$ | |
| 6. Earnings from Accounts: | \$ | |
| 7. Fees Charged: | \$ | |
| 8. Total Program Income (sum of 5-7) | \$ | |
| 9. How much of Total Program Income (line 8) has been used to cover administration costs to date? | \$ | |
| 10. How much of Total Program Income has been added to the RLF for lending (line 8 minus line 9)? | \$ | |

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| | | |
|---|----|---|
| C. Status of RLF Capital: | | |
| 11. Total RLF Funding (line 4): | \$ | |
| 12. Program Income Added to RLF for lending (line 10): | \$ | |
| 13. Losses on Loans & Guarantees (amount lost from Part I.A.7 & b.7): | \$ | |
| 14. Current level of RLF Base Capital (sum of lines 11 & 12, less line 13): | \$ | |
| D. Current Balance Available for New Loans: | | |
| 15. RLF Principal Outstanding on Loans (from Part I.A.6): | \$ | |
| 16. RLF \$\$ Reserved for Loan Guarantees (from Part I.B.6): | \$ | |
| 17. Current Balance Available (deduct amounts shown on lines 15 & 16 from Current level of Base Capital (line 14): | \$ | |
| 18. RLF \$\$ committed but not disbursed: | \$ | |
| 19. Current Balance Available (deduct amount on line 18 from line 17): | \$ | |
| 20. Current Balance Available (line 19) as a Percent of RLF Base Capital (line 14) - applies only to fully disbursed RLFs, otherwise enter N/A: | | % |
| 21. Same calculation as in line 20 above, but for preceding six month period (see prior Semiannual Report): | | % |
| <i>Note: If lines 20 and 21 both exceed 25%, see instructions.</i> | | |

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| PART IV: PORTFOLIO LOAN LIST | | |
|--|--|--|
| Provide the following information for each RLF loan closed: | | |
| Loan Recipient | Loan Type & Description | Financing By Source (Specify) |
| 1. Borrower Name 2. Location (include city, county & state) 3. SIC Code - 4 Digit 4. Minority Owned 5. Woman Owned | 1. Direct/Guaranty 2. Fixed Asset/Working Capital 3. Start-up, Expansion or Retention | 1. RLF \$ 2. Other Public \$ 3. Private \$ 4. New Equity \$ 5. Total \$ 6. Amount Guaranteed \$ |
| Closing Date & Loan Terms | Loan Status | Repayment Status |
| 1. Date Close 2. Term: Years 3. Interest Rate 4. Total Fees | 1. Fully Repaid: Date 2. Current as of: Date 3. Delinquent: Days 4. Default: Days 5. Write-Off: Date | 1. Principal Repaid 2. Interest Paid 3. Amount Delinquent 4. Amount Default 5. Amount Written-Off |
| Job Impact | | |
| 1. Pre-Loan jobs 2. Jobs Created 3. Jobs Saved 4. Minority jobs (Created/saved) 5. Women jobs (Created/Saved) | | |
| PART V: MISCELLANEOUS INFORMATION & CERTIFICATION | | |
| A. Recent Loan Activity (Last 12 Months Only) | | |
| 1. # Applications Received: | | |
| 2. # Applications Received from minority-owned firms: | | |
| and Women-owned firms: | | |
| 3. # Loans closed: | | |
| 4. # Loans closed from Minority-owned firms: | | |
| and Women-owned firms: | | |

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| | | | |
|---|-----|-------------------------|-----|
| B. Capital Utilization (Section X. of RLF Administrative Manual) | | | |
| | | Complete as appropriate | |
| 5. On page 4 of this Semiannual Report, if the percentages calculated in both D.20 and D.21 are greater than 25%, is an explanation attached discussing proposed actions (including target dates and goals) to reduce the amount of excess funds on hand? <i>(Check one)</i> | | YES | NO |
| | | | |
| 6. If both D.20 and D.21 on page 4 of this Semiannual Report are greater than 25%, list the amount of excess funds subject to sequestration. | \$ | | |
| 7. List any amount in #6 that has been sequestered in a separate account. | \$ | | |
| C. RLF Income and Expenses (Section VII of RLF Administrative Plan) | | | |
| | | Complete as appropriate | |
| 8. Enter the month and day of the accounting period which has been selected for reporting of RLF Income and Expenses in accordance with Section VII.C. of the RLF Administrative Manual. | | | |
| 9. Enter the amount of RLF Income earned during the most recent 12 month period, which was designated in #8. | \$ | | |
| 10. Enter the amount of RLF Income that was used for administrative costs during the most recent 12-month period, which was designated in #8. | \$ | | |
| 11. Divide the administrative costs reported in #10 by the RLF Income reported in #9 and enter the percentage figure. | | % | |
| 12. If the percentage in #11 is larger than 50%, or the amount in #10 is greater than \$100,000, was an Income and Expense Statement submitted to EDA as required in Section VII.C.2. of the RLF Administrative Manual. <i>(Check One)</i> (If applicable and not sent, submit an Income and Expense Statement with this report.) | YES | NO | N/A |
| | | | |
| D. Administration | | | |
| | | Complete as appropriate | |
| 13. Any key Staff Turnover in the last 12 months? <i>(Check One)</i> List position(s): | | YES | NO |
| | | | |
| 14. Attach a list of the current RLF Loan Board membership by name, occupation, race and gender. | | | |
| 15. Enter the ending date of the most recent independent Audit covering the recipient and indicate type of Audit, i.e., "Single" or "Program Specific". | | | |

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| | | |
|--|-----|----|
| 16. Attach the Audit referenced in #15 if it was not previously submitted to EDA. | | |
| 17. If the Audit referenced in #15 did not cover either the most recent or prior fiscal year end period, is an explanation attached? <i>(Check One)</i> | YES | NO |
| E. ANNUAL RLF PLAN CERTIFICATION (Section VIII of the RLF Administrative Manual and Section D.03 of the Standard Terms and Conditions) | | |
| 18. Is the required ANNUAL RLF Plan Certification attached? <i>(Check One)</i> If "no," indicate the date it will be submitted: | YES | NO |
| F. COMPLIANCE WITH IMPLEMENTATION SCHEDULE (To be completed only if grant is not fully disbursed) | | |
| 19. Is the actual grant implementation/disbursement progress in accordance with the schedule set forth by the Implementation Special Condition (or an EDA approved amendment thereto) required as a part of this grant award? <i>(Check One)</i> if "no," attach explanation. | YES | NO |

CERTIFICATION: I hereby certify on this ____ day of _____, 19 ____, that the information provided in this Semiannual Report is true and correct to the best of my knowledge.

NAME AND TITLE OF AUTHORIZED OFFICIAL

SIGNATURE (Authorized Official)

Check Attachments Submitted:

- _____ Capital Utilization (#5 above)
- _____ Current Loan Board Membership (#14)
- _____ Copy of Audit (#16)
- _____ Audit Explanation (#17)
- _____ Annual RLF Plan Certification (#18)

INSTRUCTIONS FOR COMPLETION OF EDA'S SEMIANNUAL REPORTS FOR REVOLVING LOAN FUND GRANTS

The instructions below are in outline form and correspond to identical items in the Semiannual Report. Complete the Semiannual Report by filling in the spaces and responding to the questions. On page one of the Report, indicate the reporting period in the upper right hand corner. The reporting periods end on September 30 and March 31, and all data entries are to be effective with these ending dates. Submit completed Reports to the EDA regional office by November 1 and May 1, respectively. DO NOT INCLUDE IN

PARTS 1-3 OF THE REPORT ANY DATA ON INITIAL LOANS UNDER A SECTION 209 SSED GRANT/LOAN; LIST THESE ITEMS SEPARATELY IN PART 4 ONLY.

PART I: PORTFOLIO STATUS

A. Status of Direct Loans: Show the current status of all direct RLF loans that have been closed. DO NOT include approved loans that have not been closed. In column two, "RLF \$ Loaned," include only the funds loaned by the RLF, including EDA and grantee matching funds, NOT the financing provided by other lenders.

1. **Total Loans Made:** Enter the total number and dollar amount of all RLF loans

closed to date. Under column two, "RLF \$ Loaned," the amount should always represent the original loan amount.

2. *Fully Repaid:* Enter the number and original dollar amount of RLF loans that have been fully repaid.

3. *Current Loans:* Enter the number and original dollar amount of RLF loans that are current on RLF loan payments. In column three, "RLF Principal Outstanding," enter the principal balance outstanding for current RLF loans.

4. *Delinquent:* Enter the number and original dollar amount of RLF loans that are delinquent. For this report, a "delinquent" loan is defined as one that is up to 60 days past due. Enter also the principal balance outstanding on the delinquent loans. (If a previously delinquent borrower is now current, or making payments in accordance with an amended note and payment schedule, show this loan as current).

5. *In Default:* Enter the number and original dollar amount of RLF loans that are in default. For this report, a "default" is defined as any loan that is over 60 days past due but not written off. (An RLF grantee may, at its option, classify a loan as defaulted if it is under 60 days past due. If a previously defaulted loan has been rewritten and/or the borrower is now current, the loan should be shown as current). Enter the principal balance outstanding on defaulted loans.

6. *Total Active Loans:* On line 6, enter the sum of lines 3, 4, and 5 to obtain the number, amount and principal outstanding for Total Active Loans. (Total Active Loans are defined as loans that are either current, delinquent or in default—exclusive of loans that have been fully repaid or written off).

7. *Total Written Off:* Enter the aggregate number and original amounts of defaulted loans that have been written off. Enter also the principal balance outstanding on loans written off or the actual amount lost, whichever is smaller.

B. *Status of Loan Guarantees:* The same criteria as above apply to the Status of Loan Guarantees. In column two, note that the "RLF \$ Reserved" are the RLF dollars that are actually set aside and held in reserve to cover any losses on guaranteed loans. In column three, "Total Amount Guaranteed" is the amount of the original loan that is/was guaranteed by the RLF. In column four, "Current Exposure" is the dollar amount of the RLF's contingent liability as of the date of the current report; this amount is usually computed by multiplying the percent of the original guarantee by the outstanding loan balance.

PART II: PORTFOLIO SUMMARY

A. *Summary of Loan Activities:* For each listed item, provide information on both Total and Active RLF loans closed to date. Total Loans include loans that are current,

delinquent and in default, as well as those that have been fully repaid and written off. Active Loans include only current delinquent and defaulted loans, specifically those included in A.3-5. and B.3-5., Part I, page one, of the Semiannual Report.

1. *# RLF Loans:* Enter the number of RLF loans closed for both Total Loan (I.A.6. and I.B.6., page one) categories. Be sure to include the number of both direct and guaranteed loans closed.

2. *RLF \$\$ Loaned:* Enter the amount of RLF dollars loaned for both Total Loan (I.A.1. and I.B.1., page one) and Active Loan (I.A.6. and I.B.6., page one) categories. For loan guarantees, use column three, "Total Amount Guaranteed," for the RLF dollar amount loaned.

3. *Non-RLF \$\$ Leveraged by RLF:*

a. *Private:* Enter the Private Dollars Leveraged for both Total and Active Loan categories. Unless stipulated otherwise in the grant agreement, RLF loans must be used to leverage private investment of at least two dollars for every one dollar of RLF investment. Private dollars leveraged include private financing and private investments provided to the "project" in which the RLF is an integral component. A "project" is defined as an activity consisting of inter-related components which share a common goal. Private investments include both cash provided to the project and donated assets which come from outside the borrowing enterprise. For donated assets, only the equity in the assets (defined as the assets' market value less any security interest) may be counted in the leverage ratio. For purposes of calculating private dollars invested, 90 percent of the guaranteed portions of SBA 7(a) and SBA 504 debenture loans may be included. As a reminder, the RLF must fill a legitimate financing gap in the project for the private funds to be considered "leveraged dollars".

b. *Other:* Enter any Other investments Leveraged for both Total and Active Loan categories by the RLF loan in the "project", including other public financing (e.g., HUD-CDBG, USDA-IRP loans, etc.).

4. *Total Project Financing:* Enter the sum of RLF dollars loaned and non-RLF dollars leveraged by the RLF, items II.A.2. plus II.A.3.c.

5. *Private Sector Jobs:* Enter the number of jobs created and the number of saved jobs for both Total and Active loan categories. In tallying jobs, only permanent and direct jobs may be counted; part-time jobs should be converted to full-time equivalents (by summing the total hours worked per week for all part-time employees and dividing by the standard hourly work week for full-time employees, normally 35-40 hours). Job information data should be collected at least annually. For seasonal businesses, more frequent collection of job data is usually necessary to

obtain realistic employment figures for an annualized average.

Grantees should use the following definitions in completing the job information section of this report:

a. *Actual Created Jobs:* A job is counted as “created (actual)” if it was created as a result of and attributable to the RLF loan project, and has been verified by the borrower (or grantee) as actually created. Jobs are usually verified by requesting the borrower to complete a questionnaire at least on an annual basis indicating the number of jobs actually created and attributable to the RLF project, or by the grantee performing an on-site job count. Other job data should also be requested from the borrowers in order to complete Part IV of the Report. The documentation for job counts should be placed in the project files.

Created jobs may be credited if the jobs were created within five years of loan disbursement or, if construction is involved, within five years after construction completion. All jobs credited must be attributable to the RLF project. A created job must be removed from the credited created jobs if the job fails to last at least 18 months. Any job which meets the creditable job created criteria is counted as part of the total actual jobs created permanently, regardless of the status of the loan.

For loans that have been paid in full, grantees may use the job information data that is on file provided there is adequate confidence in the reliability of the data. If there is a question on the reliability, the data should be verified by the next semi-annual reporting period.

b. *Saved Jobs* are existing jobs where it can be documented that without the RLF assistance the jobs would have been lost.

Exception—*Created/Saved Jobs Subsequently Lost:* If an RLF borrower subsequently ceases business (or closes a segment of its business) thereby eliminating previously created or saved jobs, these jobs may continue to be counted in the Semiannual Report only if they were maintained for a minimum of 18 months prior to the loss.

6. *RLF \$\$ Loaned for Fixed Assets:* Enter for both Total and Active loan categories, the amount of closed RLF loans that were used for the purchase, installation or construction of fixed assets. If a single RLF loan was used jointly for fixed asset and working capital purposes, only the fixed asset amount should be reported on this line. For a guaranteed loan that was used jointly for fixed assets and working capital, multiply the percent of the original loan that is/was guaranteed by the amount of the loan that was used for fixed assets.

7. *RLF \$\$ Loaned for Working Capital:* Enter for both Total and Active loan categories, the amount of closed RLF loans that were used for working capital purposes as defined

by generally accepted accounting principles. Consistent with item II.A.6. above, include on this line only the amount or portion of a RLF loan that was actually used for working capital purposes. (The amounts on this line plus the amounts in II.A.6. should equal the total RLF dollars loaned in item II.A.2. for both Total and Active loans, respectively).

8. *RLF \$\$ Loaned for Start-up, Expansion & Retention:* Enter for both Total and Active loan categories, the amount of RLF loans that were used for Start-up loans, Expansion loans and Retention loans. Each loan in the RLF portfolio is to be categorized as either a Start-up, an Expansion or a Retention loan. A Start-up loan is one to a new business that has limited or no prior operating history. An Expansion loan involves an existing operating company that will expand operations and create jobs. A Retention loan is where the existing jobs of the company are “saved” as a direct result of the RLF assistance. [The sums of these loan categories (8.a. + 8.b. + 8.c.) should equal the total RLF dollars loaned in item II.A.2. for both Total and Active loans, respectively].

9. *RLF \$\$ Loaned for Industrial, Commercial & Service:* Enter for both Total and Active loan categories, the dollar amount of closed RLF loans that went to Industrial, Commercial and Service projects. All RLF loans should be placed in one of these three categories, which are defined below and which utilized the Standard Industrial Classification (SIC) Manual as a guide:

Industrial projects include manufacturing, agriculture, forestry, fishing, mining, and construction businesses—essentially businesses engaged in the production of a product.

Commercial projects include retail and wholesale trade businesses.

Service projects include businesses which provide a service to individuals or businesses, i.e., those not engaged in the production of a product or the sale of merchandise.

10. *RLF \$\$ Loaned for Minority Businesses:* Enter for both Total and Active loan categories, the amount of closed RLF loans that went to minority-owned businesses. To be considered minority-owned, a company must be at least 51 percent owned by African-Americans, Hispanics, Asians and/or Indians.

11. *RLF \$\$ Loaned for Women-owned Businesses:* Enter for both Total and Active loan categories, the amount of closed RLF loans that went to women-owned businesses. Include only firms with at least 51 percent ownership by women.

12. *Other:* Enter for both Total and Active loan categories, the amount of closed RLF loans that went to a targeted use identified in the RLF Plan but not included above.

B. *Comparison of RLF Portfolio to RLF Plan:* As indicated in the narrative in the Semi-annual Report, use the RLF Plan to obtain the applicable ratios and percentages for

completing the first column. For column two (Total Loans) and column three (Active Loans), use the appropriate figures from Part II.A. to compute the ratios and percentages requested. The formula for each item is listed in the brackets next to that item. [As an example, item #1—Cost per Job, is computed by dividing the figures on line A.2. by those on line A.5.d. (from Part II) for both Total and Active loans, respectively].

PART III: PORTFOLIO FINANCIAL STATUS

A. *RLF Funding Sources:*

1.-3. Enter on lines one through three the total funds committed to the RLF by funding source, regardless of whether the funds have been drawn into the RLF. Outside of the EDA funds, the funding categories will include either funds provided solely by the grantee or from "other" sources, e.g., CDBG, state, or private donations for the specific use of the RLF. Specify the funding source if "other".

4. Enter the sum of all funding sources, items III.A.1. through III.A.3. inclusive.

B. *Program Income Earned to Date:*

5. Enter the total interest earned directly from RLF loans. This amount should equal the aggregate interest earned from individual loans which are listed in Part IV.

6. Enter interest earned from deposits and investments of:

a. RLF loan payments, including principal and interest;

b. RLF loan fees, including origination, servicing and processing fees, late fees and penalties; and

c. Advances of local matching funds and EDA funds. EDA funds must be timed to meet the actual, immediate disbursement needs of the RLF borrowers. Otherwise, grant funds plus any interest earned thereon must be returned to EDA. (Note that grantees may deduct and retain a portion of such earned interest for administrative expenses up to the maximum amounts allowed under either 15 CFR Part 24 or OMB Circular A-110 or its implementing Department regulation, as applicable).

7. Enter the aggregate of all fees earned from RLF loans from processing, servicing, closing, late fees and any other loan-related earnings.

8. Enter the sum of III.B.5. through III.B.7., inclusive.

9. Enter the amount from III.B.8. that has been used to cover eligible RLF administrative expenses to date. (Time cards are to be maintained for all direct labor costs charged against RLF Program Income. If indirect costs are charged against the RLF, the grantee must have an indirect cost allocation plan). Inasmuch as RLF administrative costs can only be reimbursed from RLF income earned in the same accounting period, available RLF income earned in a current period may be set aside for administrative

costs which will be incurred over the remainder of the period (Refer to Section VII. of the Administrative Manual for additional information).

10. Subtract the amount on line III.B.9. from III.B.8. and enter the difference here. Do not deduct amounts set aside for future administrative expenses. Lines III.B.8 less line III.B.9. should equal the amount of line III.B.10; if not, explain on separate page. Note that if the grant recipient anticipates using any of the available RLF income earned in the current period during the remainder of the period, it may deduct this from the amount otherwise reported in the space. Conversely, if the recipient is certain that it will not need any of the available RLF income during the remainder of the period, it should include this amount in the figure reported as RLF Income added to the RLF for Lending. Any RLF income on hand at the end of a period must be added to the RLF Capital Base for lending purposes.

(Note: References to Program Income in B.8. through B.10. should be interpreted to mean RLF Income as used in the RLF Administrative Manual).

C. *Status of RLF Capital:*

11. Self-explanatory (enter the amount from III.A.4.).

12. Self-explanatory (enter the amount from III.B.10.).

13. Self-explanatory (enter the sum of the amounts lost from direct loans and guaranteed loans, from I.A.7. and I.B.7., page 1 respectively).

14. Self-explanatory (enter the sum of III.C.11. and III.C.12., less III.C.13.).

D. *Current Balance Available for New Loans:*

15. Self-explanatory (enter the RLF principal outstanding from I.A.6., page 1).

16. Self-explanatory (enter the total RLF dollars reserved for loan guarantees, which are not available for lending, from I.B.6., page 1).

17. Self-explanatory (deduct amounts shown in III.D.15. and III.D.16. from III.C.14.).

18. Enter the aggregate amount of RLF funds that have been approved and committed but not closed nor disbursed.

19. Self-explanatory (enter the amount in III.D.17. less III.D.18.).

20. Current Balance Available Percentage—applies only to RLF's that have been fully disbursed. Enter the percent that is obtained by dividing the amount in III.D.19. by the amount in III.C.14.

21. Insert the Current Balance Available Percentage (same calculation as in #20 above), but for the preceding six month period obtained from the previous Semiannual Report.

(Note: The percentages obtained in III.D.20. and III.D.21. are used to evaluate compliance with EDA's Excess Retention Policy established in 1988. If the percentages in III.D.22. and in III.D.23. both exceed 25 percent, the

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grantee is in violation of the policy and is required to submit an addendum to the report explaining the reasons for the violation and the steps it proposes to take to reduce the percentage below 25 percent. Subsequently, the grantee may be required to submit the EDA share of any amount over 25 percent, which normally will be made available to the grantee for a time period established by EDA. Funds not used during this time period may become permanently unavailable to the grantee).

PART IV: PORTFOLIO LOAN LIST

Self-explanatory.

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**PART V: MISCELLANEOUS INFORMATION &
CERTIFICATION**

A. *Recent Loan Activity:*

1.–4. Self-explanatory.

B. *Capital Utilization:* (Section X. of RLF Administrative Manual)

5.–7. Self-explanatory.

C. *RLF Income & Expenses:* (Section VII. of RLF Administrative Plan)

8.–12. Self-explanatory.

D. *Administration:*

13.–17. Self-explanatory.

E. *Annual RLF Plan Certification:* (Section VIII. of the RLF Administrative Manual and Section D.03. of the Standard Terms and Conditions)

18. Self-explanatory (Required only once a year).

ANNUAL REPORT FOR EDA-FUNDED RLF GRANTS

Grantee Name: _____ Period Ending _____

Project No. _____ Contact Person: _____

Phone: _____

| A. PORTFOLIO FINANCIAL STATUS | | |
|---|----|---|
| 1. Total RLF Funding (EDA + Matching funds) | \$ | |
| 2. Total RLF Income Earned | \$ | |
| 3. Total RLF Income Expended for Administrative Costs | \$ | |
| 4. RLF Income in #2 that is set aside for Current Period Expenses | \$ | |
| 5. Total Losses on Direct and Guaranteed Loans | \$ | |
| 6. RLF Capital Base [(1+2) less (3+4+5)] | \$ | |
| 7. RLF Loan Principal Outstanding | \$ | |
| 8. RLF \$\$ Reserved for Guarantees | \$ | |
| 9. RLF Loan Commitments Not Disbursed | \$ | |
| 10. RLF Capital Utilized [7+8+9] | \$ | |
| 11. RLF Capital Utilization Rate [10 / 6] | | % |
| 12. Same as #11 but for Preceding 6-Month Period | | % |

| B. RECENT LOAN ACTIVITY (Last 12 Months Only) | |
|--|--|
| 13. # Applications Received | |
| 14. a. # Applications Received from Minority-owned firms | |
| b. # Applications Received from Women-owned firms | |
| 15. # Loans Closed | |
| 16. a. # Loans Closed from Minority-owned Firms | |
| b. # Loans Closed from Women-owned Firms | |

| | |
|---|----|
| C. Portfolio Status | |
| <i>DIRECT LOANS:</i> | |
| 17. a. Total RLF \$\$ Loaned | \$ |
| b. Total # Loans made by the RLF | |
| 18. Total Active Loans | \$ |
| 19. Principal Outstanding | |
| a. Current Loans | \$ |
| b. Delinquent Loans (< 60 days) | \$ |
| c. Delinquent Loans (> 60 days) | \$ |
| 20. Total Written-Off | \$ |
| 21. Total Non-RLF \$\$ Leveraged by RLF & Leverage Ratios | |
| a. Private | \$ |
| b. Other | \$ |
| c. Total Leveraged (Private + Other) | \$ |
| <i>GUARANTEED LOANS:</i> | |
| 22. Current RLF \$\$ Exposed (<i>active loans only</i>) | \$ |
| 23. RLF \$\$ Reserved (<i>active loans only</i>) | \$ |
| | |
| 24. Total # of Actual Jobs Created and Saved | |

| | | |
|---|-----|----------------------|
| D. ADMINISTRATION | | circle or |
| complete | | as |
| appropriate | | |
| 25. Any key Staff Turnover last 12 Months? List position(s): | Yes | No |
| 26. Attach a list of the current RLF Loan Board membership by name, occupation, race and gender. | | |
| 27. Indicate the ending period of the most recent independent Audit covering the recipient and whether Single or Program Specific Audit. | | |
| 28. Attach the Audit in #27 if it was not previously submitted to EDA | | |
| 29. If the Audit in #27 did not cover either the most recent or the prior fiscal-year period, is an explanation attached? (<i>Circle One</i>) | Yes | No Not Applicable |

EXHIBIT E (Rev. 12/98)

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| | | |
|---|--|--|
| D. ADMINISTRATION | | circle or complete as appropriate |
| 30. Enter the ending date of the accounting period which has been selected to determine the amount reported in #4 above in accordance with Section VII.C. of the RLF Administrative Manual. | | |

| | | |
|---|-----|--|
| E. CAPITAL UTILIZATION (Section X of RLF Administrative Manual) | | circle or complete as appropriate |
| 31. If the percentages in both #11 and #12 above are less than 75%, is an explanation attached discussing proposed actions (including target dates and goals) to reduce the amount of excess funds on hand? | Yes | No |
| 32. If both #11 and #12 are less than 75%, list the amount of excess funds subject to sequestration. | \$ | |
| 33. List any amount in #31 that has been sequestered in a separate account. | \$ | |
| F. ANNUAL RLF PLAN CERTIFICATION (Section VIII of RLF Administrative Manual and Section D.03 of Standard Terms and Conditions) | | circle or complete as appropriate |
| 34. Is the required <i>ANNUAL</i> RLF Plan Certification attached? If "no," indicate the date it will be submitted: _____ | Yes | No |

CERTIFICATION: I hereby certify on this ____ day of _____, 19____, that the information provided in this Annual Report is true and correct to the best of my knowledge.

NAME AND TITLE OF AUTHORIZED OFFICIAL

SIGNATURE (Authorized Official)

Check Attachments Submitted:

| | |
|---|---|
| _____ Capital Utilization (#31 above) | _____ Audit Explanation (#29) |
| _____ Current Loan Board Membership (#26) | _____ Annual RLF Plan Certification (#34) |
| _____ Copy of Audit (#28) | |

INSTRUCTIONS FOR COMPLETION OF EDA'S ANNUAL REPORTS FOR REVOLVING LOAN FUND GRANTS

These instructions are for completion of the Annual Report form for EDA revolving loan fund (RLF) grants. The Annual Report is an abbreviated version of the Semiannual Report. RLF grantees that are reporting on a semiannual basis are eligible to apply for graduation to this streamlined report one year after full disbursement of the initial round of RLF capital.

A. PORTFOLIO FINANCIAL STATUS AND CAPITAL UTILIZATION

1. Enter the total funds committed to the RLF. Outside of EDA funds, matching funds may include funds provided solely by the grantee or from other sources, e.g., CDBG, state or private donations for the specific use of the RLF. Exclude any funding commitments that may have been removed from the RLF, as approved by EDA.

2. Enter the Total RLF Income earned by the RLF to date. RLF Income, as defined in Section VII. of the RLF Administrative Manual, includes:

- a. Total interest earned directly from RLF loans.
- b. Interest earned from deposits and investments of:
 - RLF loan payments, including principal and interest;
 - RLF loan fees, including origination, servicing and processing fees, late fees and penalties; and
 - Advances of local matching funds and EDA funds. EDA funds must be timed to meet the actual, immediate disbursement needs of the RLF borrowers. Otherwise, grant funds plus any interest earned therein must be returned to EDA. (Note that grantees may deduct and retain a portion of such earned interest for administrative expenses up to the maximum amounts allowed under either 15 CFR Part 24 or OMB Circular A-110 or its implementing Department regulation, as applicable.

3. Enter the amount from A.2. that has been used to cover eligible RLF administrative expenses to date. (Time cards are to be maintained for all direct labor costs charged against RLF Program Income. If indirect costs are charged against the RLF, the grantee must have an indirect cost allocation plan). In as much as RLF administrative costs can only be reimbursed from RLF income earned in the same accounting period, available RLF income earned in a current period may be set aside for administrative costs which will be incurred over the remainder of the period (Refer to Section VII. of the Administrative Manual for additional information).

4. Enter the amount of any available RLF Income earned in a current period which

may be set aside for future administrative costs incurred over the remainder of the period. If, however, the selected period ends on September 30, funds can not be set aside without EDA approval since any RLF Income that is not used for administrative costs during the period in which it is earned must be added to the RLF Capital Base at the end of the period.

5. Enter the cumulative Losses on Direct and Guaranteed Loans for those loans written-off.

6. Calculate the current level of the RLF's Capital Base by adding the amounts entered in #1 and #2, and subtracting from this sum the amounts in #3, #4 and #5. The RLF Capital Base represents the aggregate amount of capital potentially available for lending.

7. Enter the amount of Loan Principal Outstanding on Direct RLF Loans.

8. Enter the amount of RLF dollars that are required to be set aside or reserved for RLF guarantees of other loans. If not applicable, enter N/A.

9. Enter the aggregate amount of RLF funds that have been approved and committed but not closed nor disbursed.

10. Calculate the amount of RLF Capital Utilized, i.e., RLF capital outstanding and committed, by summing the amounts in #7, #8 and #9.

11. Calculate the RLF Utilization Rate by dividing #10 (RLF Capital Utilized) by #6 (RLF Capital Base). This indicates the percentage of RLF capital in use for comparison with the Capital Utilization Standard as discussed in Section X. of the Administrative Manual. Persistent noncompliance with the Standard could require sequestration of excess funds, remittance of interest earned on sequestered funds, and eventual loss of excess funds if not placed in use within a reasonable period of time.

12. The RLF Capital Utilization Rate is calculated every six months for the periods ending March 31 and September 30, in accordance with Section X.C. of the RLF Administrative Manual.

B. RECENT LOAN ACTIVITY

13–16. As appropriate, enter the number of applications received and loans closed for the last 12 month period. Also enter the number of applications received and the number of loans closed from Minority-owned and Women-owned firms. Ownership is defined as controlling interest of 51% or more. A loan is considered closed when all loan documents have been signed.

C. PORTFOLIO STATUS

17. Enter the total number and original dollar amount of all RLF loans made to date.

18. Enter the amount of principal outstanding for Total Active Loans. (Total Active Loans are defined as direct loans that

are either current, delinquent or in default—exclusive of loans that have been fully repaid or written off).

19. For active loans only, enter the principal outstanding on direct loans that are current and those that are delinquent. Segregate delinquent loans into two categories, those less than or equal to 60 days past due and those more than 60 days past due. For this report, a “delinquent” loan is defined as one that is up to 60 days past due. (If a previously delinquent borrower is now current, or making payments in accordance with an amended note and payment schedule, show this loan as current).

20. Enter the total principal balance outstanding on direct loans written-off or the actual amount lost, whichever is smaller.

21. Enter the total non-RLF dollars leveraged (Private & Other) and corresponding leverage ratios in conjunction with the RLF direct loans. Unless stipulated otherwise in the grant agreement, RLF loans must be used to leverage private investment of at least two dollars for every one dollar of RLF investment. Private dollars leveraged include private financing and private investments provided to the “project” in which the RLF is an integral component. A project is defined as an activity consisting of inter-related components which share a common goal. Private investments include both cash provided to the project and donated assets which come from outside the borrowing enterprise. For donated assets, only the equity in the assets (defined as the assets’ market value less any security interest) may be counted in the leverage ratio. For purposes of calculating private dollars invested, 90 percent of the guaranteed portions of SBA 7 (a) and SBA 504 debenture loans may be included. As a reminder, the RLF must fill a legitimate financing gap in the project for the private funds to be considered “leveraged dollars”.

Other investments leveraged by the RLF in the project may include other non-RLF dollars such as HUD-CDBG, USDA-IRP loans, etc.

22. For active loans provided by other lenders and guaranteed by the RLF, enter the contingent liability of the RLF on outstanding loan principal, i.e., the current RLF exposure on all active RLF guarantees. This amount is usually computed by multiplying the percent of the original guarantee by the outstanding loan balance.

23. For active loans provided by other lenders and guaranteed by the RLF, enter any amounts of RLF funds that are actually set aside and held in reserve to cover any losses on guaranteed loans.

24. Enter the total number of jobs created and saved over the life of the RLF. In tallying jobs, only permanent and direct jobs may be counted; part-time jobs should be converted to full-time equivalents (by sum-

ming the total hours worked per week for all part-time employees and dividing by the standard hourly work week for full-time employees, normally 35-40 hours). Job information data should be collected at least annually. For seasonal businesses, more frequent collection of job data is usually necessary to obtain realistic employment figures for an annualized average.

Grantees should use the following definitions in completing the job information section of this report:

a: *Actual Created Jobs*: A job is counted as “created (actual)” if it was created as a result of and attributable to the RLF loan project, and has been verified by the borrower (or grantee) to complete a questionnaire at least on an annual basis indicating the number of jobs actually created and attributable to the RLF project, or by the grantee performing an on-site job count. The documentation for job counts should be placed in the project files.

Created jobs may be credited if the jobs were created within five years of loan disbursement or, if construction is involved, within five years after construction completion. All jobs credited must be attributable to the RLF project. A created job must be removed from the credited created jobs if the job fails to last at least 18 months. Any job which meets the creditable job created criteria is counted as part of the total actual jobs created permanently, regardless of the status of the loan.

For loans that have been paid in full, grantees may use the job information data that is on file provided there is adequate confidence in the reliability of the data. If there is a question on the reliability, the data should be verified by the next annual reporting period.

b: *Saved Jobs* are existing jobs where it can be documented that without the RLF assistance the jobs would have been lost.

Exception—*Created/Saved Jobs Subsequently Lost*: If an RLF borrower subsequently ceases business (or closes a segment of its business) thereby eliminating previously created or saved jobs, these jobs may continue to be counted in the Annual Report only if they were maintained for a minimum of 18 months prior to the loss.

D. ADMINISTRATION

25-30. Self-explanatory.

E. CAPITAL UTILIZATION

31-33. Self-explanatory (Refer to Section X. of the RLF Administrative Manual).

F. RLF PLAN CERTIFICATION

34. Self-explanatory (See Section VIII. of the RLF Administrative Manual and Section D.03. of the RLF Standard Terms and Conditions for additional details).

APPENDIX D TO PART 308—SECTION 209
ECONOMIC ADJUSTMENT PROGRAM
REVOLVING LOAN FUND GRANTS;
AUDIT GUIDELINES

OMB Approval No. 0610–0095 Approval expires
07/31/99

BURDEN STATEMENT FOR REVOLVING LOAN
FUND AUDIT MANUAL

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

The information is required to obtain or retain benefits from the Economic Development Administration pursuant to Economic Development Administration Reform Act, Public Law 105–393. The reason for collecting this information is to enable the Economic Development Administration to monitor revolving loan fund projects for compliance with Federal and other requirements. No confidentiality for the information submitted is promised or provided except that which is exempt under 5 U.S.C. 552(b)(4) as confidential business information.

The public reporting burden for this collection is estimated to average 12 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Economic Development Administration, Herbert C. Hoover Building, Washington, DC 20230, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

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SECTION 209 ECONOMIC ADJUSTMENT PROGRAM
REVOLVING LOAN FUND GRANTS AUDIT
GUIDELINES

I. PURPOSE

This document describes the audit requirements for revolving loan fund (RLF) grants funded under the Section 209 Economic Adjustment Program of the Economic Development Administration (EDA). It provides an overview of relevant Office of Management and Budget (OMB) circulars and other Federal regulations as they relate to administrative and audit requirements for EDA RLF grants. It also discusses costs that may be eligible under an RLF grant program and requirements for records retention. It is intended to supplement applicable OMB circulars and Federal regulations. If there is a conflict between information contained in this document and the OMB circulars or Federal regulations, the latter shall prevail. In the absence of a conflict, EDA reserves the right to limit Federal standards.

This document is intended for grant recipients and for independent auditors as an aid in understanding the audit and compliance requirements for EDA RLF grants. Each recipient of an EDA RLF grant is responsible for reading this document and providing it to the independent auditor prior to the start of an audit. Failure to make this information available to the independent auditor could result in an unacceptable audit report.

II. PROGRAM OBJECTIVES

RLF grants are administered under EDA's Section 209 Program, which was created in 1974 by an amendment to the Public Works and Economic Development Act of 1965 (PWEDA), to provide grant assistance to help communities adjust to sudden and severe economic dislocations (SSED) and long-term economic deterioration (LTED). EDA Section 209 grants may be used for business development assistance, planning, research,

technical assistance, training, infrastructure, and other development activities which meet the purpose of the program.

RLF grants provide capital for loan pools which finance business development activities consistent with local economic development strategies. Loan repayments, plus interest and other related income, create a revolving source of capital to finance other business enterprises. RLF loans are used to stimulate economic activity and to provide financing to businesses when private credit is unavailable to complete a project.

III. PROGRAM PROCEDURES

Priority consideration for RLF funding is given to those proposals which have the greatest potential to benefit areas experiencing or threatened with substantial economic distress. Proposals are evaluated based on conformance with statutory and regulatory requirements, the economic adjustment needs of the area, the merits of the proposed project in addressing those needs, and the applicant's ability to manage the grant effectively. Each approved RLF grant is operated in accordance with an RLF Plan which is part of the grant agreement. The RLF Plan summarizes the RLF's strategic objectives and the operational procedures to carry out the purpose of the grant.

IV. PROGRAM HISTORY

EDA awarded its first RLF grant in 1975. To date, the Agency has awarded more than 700 grants aggregating in excess of \$500 million for the establishment or recapitalization of RLFs nationwide. In turn, RLF grantees have made more than 7,200 loans to private sector businesses, which loans have either leveraged or have the potential for leveraging in excess of \$1.9 billion private capital based on a private investment to total RLF monies loaned ratio of 3.83:1. There are generally two types of RLF grants, those established as RLFs from the initial disbursement of grant funds, and those established only after repayments are received from business loans originally funded from grants. Most RLF grants are of the first type.

RLF programs are operated by local governments, regional development corporations, States and other non-profit organizations. EDA RLF grants normally require a matching contribution from local sources. Historically, the local match contribution has averaged 25% of an RLF's capitalization, but waivers have been extended in special situations such as natural disasters. The average EDA RLF grant was capitalized at just over \$1 million in total assets. While the size of individual loans extended by these grant recipients vary markedly, the typical RLF loan has averaged \$70,000 over time.

V. FREQUENCY OF AUDITS

Each RLF grant recipient shall have an audit performed annually for the duration of the RLF program except in the following limited circumstances which may permit biennial audits:

- A state or local government recipient that adopted a mandatory, constitutional or statutory requirement for less frequent audits prior to January 1, 1987, which requirement still remains in effect; or
- A non-profit recipient that had biennial audits for all biennial periods ending between July 1, 1992 and January 1, 1995.

VI. WHEN AN AUDIT IS REQUIRED

Pursuant to the Single Audit Act Amendments of 1996 (P.L. 104-156) and OMB Circular A-133, audits are required of all State, local government and non-profit corporation RLF grant recipients that expended total Federal awards of at least \$300,000 in a given fiscal year. For all RLF grants, the calculation of RLF expenditures will include the beginning balance of all outstanding loans plus the current year's loan and loan-related expenditures. With the exception of newly awarded grants and limited circumstances listed in Paragraph V. herein, the majority of RLF grant recipients will require an annual audit.

To calculate the total RLF expended, follow the information provided in the box below. Note that only the Federal share (exclude the matching fund share) of the amount calculated should be used for the determination of an audit. Audit procedures, however, must encompass both the Federal and any matching funds which comprise an RLF.

- The year's beginning balance of outstanding RLF loans; plus
- RLF loan expenditures during the fiscal year; plus
- The amount of RLF Income¹ earned and expended on eligible administrative expenses during the fiscal year.

VII. TYPES OF AUDITS

Entities which spend \$300,000 or more in Federal awards will be required to have either (i) a program-specific audit or (ii) a single audit. An entity can elect a program-specific audit if all funds expended come from only one Federal program. An entity must have a single audit in a fiscal year in which it spends funds from more than one Federal program. These guidelines are not intended to be a complete manual of procedures, nor are they intended to supplant the auditor's

¹ RLF Income includes interest earned on loans, interest earned on accounts holding RLF funds not needed for immediate lending, loan fees received from borrowers, and other income generated from RLF activities.

judgment of the work required for either the program-specific audit or a single audit which includes coverage of an EDA RLF. The auditor should refer to OMB Circular A-133 for a detailed listing of requirements for these types of audits. These guidelines are designed to discuss special considerations for audits of RLFs.

A. Program Specific Audit

A program-specific audit is an audit of one program performed in accordance with Federal laws and regulations and any audit guides available for that program. There is not a program-specific audit guide written for the RLF program. Since a program-specific audit guide is not available, the auditee and auditor shall have basically the same responsibilities for the RLF program as they would have for an audit of a major program in a single audit. Section VIII of these guidelines describes some special considerations for auditing an EDA RLF. OMB Circular A-133, Section 235 provides instructions for completing a program-specific audit.

B. Single Audit

A single audit covers all Federal awards received and expended during an organization's fiscal year. Unlike the program specific audit, this type of audit requires a financial statement audit of the grant recipient. A single audit is performed by an independent auditor who meets the general standards specified in generally accepted government auditing standards.

Attachment I provides a current list of applicable audit-related documents with which the auditor should become familiar. Since accounting requirements and reference materials are subject to periodic revisions, grant recipients and auditors are responsible for utilizing the most current reference information available.

VIII. SPECIAL CONSIDERATIONS FOR SINGLE AUDITS OF RLFs

A. Schedule of Expenditures of Federal Awards

The auditee is required to report certain information in this schedule including: (1) the identity of all Federal award programs by program title and by catalogue number listed in the Catalog of Federal Domestic Assistance (CFDA) and (2) the total expenditures for each Federal award program by grantor agency. For EDA RLF grants, the program title is "Special Economic Development and Assistance Programs—[either Sudden and Severe Economic Dislocation (SSED) or Long-Term Economic Deterioration (LTED)] Revolving Loan Fund." The CFDA number is "11.307" for both SSED and LTED grants. To assist program officials, it is helpful to include the number of each EDA RLF grant in the schedule. The method for

calculating the total Federal expenditure amount to be reported on the schedule is shown in Section VIII.C. below.

Note that in the third and fourth digits of each grant number, an SSED grant is denoted by the number "19", and an LTED grant by the number "39". Exceptions include numerical identification of defense or disaster-related RLFs which may have several variations as determined by fiscal year or specific disaster program appropriations.

B. Criteria for Determining Major Programs

Federal award programs must be identified as Major Programs through a risk-based approach described in OMB Circular A-133. Prior to the issuance of the revised OMB Circular A-133, a Major Program was defined solely in monetary terms. The new risk-based approach also requires that the auditor consider the current and prior audit results and the inherent risk of the program in making a determination of Major Programs subject to audit. Major Programs require more extensive audit procedures than Other Federal Programs.

C. Calculating "Total Federal Expenditures" For RLF Grants

For RLF grants, "Total Federal expenditures" normally includes only the Federal share of an RLF's expenditures. It is calculated as shown in the box below using only the Federal share of each component.

Determining Total Federal Expenditures²:

- The year's beginning balance of outstanding RLF loans; plus
- RLF loan expenditures during the fiscal year; plus
- The amount of RLF Income³ earned and expended on eligible administrative expenses during the fiscal year.

D. Footnote Disclosure (Schedule)

In addition to reporting the Federal expenditures for an RLF program on the schedule of expenditures of Federal awards, a footnote to the schedule should disclose the value of the loans outstanding at the end of the year.

IX. USE OF ANOTHER ENTITY FOR PROGRAM ADMINISTRATION

A grant recipient may employ the services of another organization to perform certain duties and responsibilities under a grant. In

²If the Federal share of an RLF's total expenditures cannot be readily determined, the total RLF expenditures (including both Federal and matching funds) may be used in lieu of "total Federal expenditures" provided the inclusion of matching funds is disclosed.

³Defined in footnote 1, page 3.

delegating responsibilities, the grant recipient may be responsible for ensuring that the other entity is audited in accordance with OMB Circular A-133 and complies with the grant terms and conditions. The degree of responsibility delegated is the key factor in determining whether another entity is a subrecipient or vendor (and whether an audit is required). Subrecipients are normally required to have an audit performed while vendors would not usually be audited unless program compliance requirements apply to the vendor.

An organization is a subrecipient if it receives or is responsible for RLF funds, and some or all of the following characteristics exist. It is responsible for (i) applicable grant compliance requirements; (ii) programmatic decisions including, but not limited to, approving RLF lending policies, final lending decisions including eligibility determinations, major amendments to loans, and/or foreclosure actions; and/or (iii) its performance is measured against meeting objectives of the program.

An organization is a vendor if it provides services in support of an RLF grant and has the following distinguishing characteristics. It provides agreed services within its normal business operations and provides similar services to other purchasers, it operates in a competitive environment, and program compliance requirements usually do not directly pertain to the services provided. If grant compliance requirements apply to the vendor's activities, the grant recipient is responsible for ensuring compliance by the vendor. This may require monitoring the vendor's activities or requiring an audit of vendor activities as may be appropriate under the circumstances. A vendor is normally responsible only for compliance within the terms of its contract.

An example of a vendor would be a bank or collection company which provides services to the grant recipient merely for the collection of loan payments. This would be considered a vendor relationship because the entity under contract would not be involved with any major program decisions. However, if this entity had expanded responsibilities, such as the final approval authority for loans and foreclosure actions, it would be considered a subrecipient due to the nature and degree of its responsibilities. It would be required to be audited in accordance with OMB Circular A-133, and to comply with the terms and conditions of the grant.

X. REPORTING ENTITY

The definition of a financial reporting entity is based upon the concept of accountability. A reporting entity may consist of a primary unit and component units. The decision to include a component unit in the reporting entity is based on whether (1) the primary unit is financially accountable for

the component unit, and (2) the nature and significance of the relationship between the primary unit and the component unit is such that exclusion would cause the reporting entity's financial statements to be misleading or incomplete.

While it is management's responsibility to define the reporting entity, one of the initial tasks performed by the auditor is to independently determine whether management has properly defined the reporting entity, pursuant to the Government Accounting Standards Board's (GASB) Statement No. 14, The Financial Reporting Entity.

XI. AUDIT REPORT DUE DATES

The audit must be completed and the report package submitted within 9 months following the end of the period audited, unless a longer period has been agreed to in advance. However, for fiscal years ending on or before June 30, 1998, auditees shall have 13 months after the end of the audit period to submit the reporting package. In either case, the required reporting package shall be submitted within 30 days after issuance of the auditor's report to the auditee.

XII. DISTRIBUTION OF THE AUDIT REPORT

The reporting package should be submitted to the Federal Clearinghouse in accordance with the requirements of OMB Circular A-133, Section 320. In addition, an auditee shall submit the reporting package, leaving out the data collection form which is strictly for the Clearinghouse's use, to the EDA regional office responsible for monitoring the RLF.

XIII. AUDITOR SELECTION

In arranging for audit services, grant recipients are required to follow the administrative requirements and procurement standards prescribed in the applicable Federal administrative document found at 15 CFR, Part 24, or OMB Circular A-110. In addition, guidance in selection of an auditor is available in a document entitled "to Avoid a Substandard Audit: Suggestions for Procuring an Audit." This document was developed by the National Intergovernmental Audit Forum and is available from the General Accounting Office at telephone number (202) 512-6000.

XIV. COMPLIANCE GUIDELINES

For both program specific audits and single audits, the auditor is required to determine whether the grant recipient has complied with applicable laws and regulations. Compliance testing involves (1) the testing of specific requirements for individual Federal programs, as available, and (2) the testing of general requirements which are applicable to all Federal programs. In addition, there may be other laws and regulations listed in the grant terms which may apply to

both the grant recipient and to the RLF loan recipients.

OMB has issued a provisional compliance supplement for use with the revised OMB Circular A-133. The provisional compliance supplement addresses 14 types of compliance areas that are generic to all programs. It also addresses specific requirements for about 100 programs. It is not clear whether the RLF program will be included in the compliance supplement.

A. Specific Compliance Requirements

DOC's proposed compliance requirements and suggested audit procedures for EDA Section 209 RLF grants are provided in Attachment 2. Independent auditors should follow these procedures in testing for specific compliance requirements for RLF grants. Comments and suggestions on this material are welcome and should be submitted to the U.S. Department of Commerce, Office of Inspector General, 401 W. Peachtree Street, N.W., Suite 2342, Atlanta, GA 30308.

B. General Compliance Requirements— Supplemental Information

The OMB Compliance Supplements list fourteen general requirements and suggested auditing procedures which are applicable to all Federal assistance awards. For the general requirement listed as "Allowable Costs And Cost Principles," supplemental information is provided below. This information should be considered when testing general compliance requirements.

1. Background

Eligible Costs For RLF Grants: EDA grant funds and matching funds for an RLF must be used in accordance with the purposes specified in the grant agreement. Eligible uses generally include RLF loans and any specified costs listed in the grant agreement (e.g., budgeted audit costs). Unless specifically stated in the grant, the costs to administer an RLF program are not eligible for reimbursement from either the EDA grant or the matching funds.

RLF Income: RLF Income includes interest earned on loans, interest earned on accounts holding RLF funds not needed for immediate lending, loan fees and other income generated from RLF activities. RLF Income may be used only for RLF loans or for eligible expenses necessary to operate an RLF program. RLF Income that is used for RLF administrative expenses is subject to applicable OMB cost principles and to the requirements described below.

Only current period expenses may be expensed against current period RLF Income. Any exceptions to this require EDA approval. The accounting period for determining compliance with this requirement is selected by the grant recipient and may be

either the recipient's or the Federal fiscal year. The accounting period selected is submitted to EDA in the annual or semiannual reports. (Refer to Section VII. of the prevailing EDA RLF Administrative Manual for additional details.)

RLF program funds (including initial grant and matching funds and the repayments of loan principle and RLF Income) should be separately accounted for in the accounting system of each grant recipient. When possible, expenses charged to an RLF program should be categorized in detail at least at the level indicated in the RLF Income and Expense Statement (see Exhibit A of EDA's prevailing RLF Administrative Manual).

Cost Principles: The applicable OMB Cost Principles are found in either OMB Circular A-21, A-87, or A-122. Administrative costs that may be charged against RLF Income will be classified as either direct or indirect costs. Direct costs include those that can be identified specifically with a particular cost objective, such as an RLF program. Indirect costs are those incurred for a common or joint purpose benefitting more than one program or cost objective and are not readily assignable.

Cost Allocation Plans: Costs may be allocated against RLF Income only to the extent that they can be distributed in reasonable proportion to the benefits received, and are supported by a cost allocation plan and formal accounting records which will substantiate the propriety of charges. Indirect costs may not exceed 100% of allowable direct costs as reflected in the cost allocation plan.

Cost allocation plans, which include indirect cost rate proposals, normally must be approved by the cognizant Federal agency. Local governments (OMB Circular A-87 organizations) are required to retain cost allocation plans and/or indirect cost rate proposals at the local level unless the cognizant agency requests submittal for negotiation and approval. All cost allocation plans and/or indirect cost rate proposals must be approved at the local level and must be available to the cognizant agency, if requested. The independent auditor is responsible for reviewing cost allocation plans and/or indirect cost rate proposals to determine the reasonableness and validity of costs charged against different cost objectives or programs.

The Office of Inspector General, U.S. Department of Commerce (OIG), is designated the cognizant agency responsible for the audit, approval and negotiation of cost allocation plans and/or indirect cost rate proposals for most EDA economic development districts, as defined in Title IV of PWEDA. When an EDA district organization allocates costs requiring a cost allocation plan and/or an indirect cost rate proposal, the organization is not required to submit either of these to the OIG unless the OIG is the cognizant agency and requests submittal, or the cost

allocation plan and/or the indirect cost rate proposal is the initial one for the organization. Cost allocation plans and indirect cost rate proposals must be available for review upon demand, if requested.

2. Common RLF Administrative Costs

A description of common administrative costs that may be charged against RLF Income include, but are not limited to, the following:

Advertising/Marketing: Allowable costs for advertising and marketing include costs for media services to recruit RLF personnel, market the RLF program, solicit RLF loan prospects, procure RLF-related goods and services, and sell RLF assets. Eligible costs may also include the cost of printing RLF brochures and travel and other expenses directly related to the promotion of an RLF program.

Audits: The costs of audits conducted in accordance with the grant audit requirements are allowable. The charges may be treated as either direct or indirect costs consistent with the applicable OMB cost principles. Grant and matching funds may be used for audit costs only to the extent listed in the approved grant budget or grant terms. In addition, auditing costs charged against an RLF program may not exceed an RLF's equitable share of the cost.

Bonding: The costs of premiums for fidelity bonds covering employees who handle RLF funds are allowable to the extent that such costs are reasonable and distributed equitably in proportion to the RLF's share of the costs.

Building Space: Rent for building space or the utilization of depreciation or use allowances is an allowable expense subject to the provisions of the applicable OMB cost principles. Maintenance costs are eligible expenses to the extent that they are not otherwise included in rental or other charges for space. See also "Lease Transactions" below.

Capital Expenditures: In accordance with current OMB cost principles, capital expenditures for equipment and other capital assets require prior EDA approval. For state and local governments (OMB Circular A-87), equipment is defined as tangible, personal property having a useful life of more than one year and an acquisition cost which equals the lesser of the capitalization level established by the organization or \$5,000. For nonprofits (OMB Circular A-122 organizations), equipment is defined as tangible, personal property having a useful life of more than two years and an acquisition cost of more than \$500 per unit. The dollar amount for nonprofits is expected to increase when OMB Circular A-122 is revised. In the interim, nonprofits may request EDA to approve an amendment to the grant terms to allow for purchases of capital equipment up

to the lesser of the capitalization level established by the organization or \$5,000.⁴

Where appropriate, an analysis should be made of lease vs. purchase alternatives to determine which would be the most economical and practical procurement method. To be an allowable charge against RLF Income, a capital expenditure must be reasonable and essential for the operation and administration of an RLF program. Such charges must reflect an RLF's use of the equipment based upon an equitable allocation method.

Alternatively, grant recipients may be compensated for the use of equipment and other nonexpendable personal property through depreciation or use allowances subject to the provisions of the applicable OMB cost principles and the requirements herein.

Procurement transactions must be conducted in a manner which provides, to the maximum extent practical, open and free competition consistent with the procurement standards published at 15 CFR Part 24 or in OMB Circular A-110, as applicable. When acquired personal property is no longer needed for RLF activities or is disposed of for upgrading purposes, the RLF should be compensated for its share of the disposition proceeds. Procedures should be established and followed to provide for the highest possible return on property disposition.

Employee Salaries & Fringe: Allowable employee salaries and fringe includes the compensation for personal services including, but not limited to salaries, wages and fringe benefits. Payrolls must be supportable by time and attendance or equivalent records for individual employees. Salaries, wages and fringe benefits of employees chargeable to more than one grant program or other cost objective must be supportable by appropriate time distribution records, or a cost allocation plan, and distributed equitably in reasonable proportion to the benefits received. Compensation for employee services may include only those services performed during the grant period.

The salaries and expenses of the office of the Governor of a State or the chief executive of a political subdivisions thereof, are considered a cost of general government and are unallowable as an expense against RLF Income. The salary and expenses of an executive director of an EDA economic development district are allowable, provided such costs are allocated equitably relative to the benefits derived and the total costs charged

⁴A request for a grant amendment would allow the use of current period RLF Income for current purchases (up to \$5,000 per unit) for equipment, other capital assets, and repairs which materially increase the value or useful life of capital assets and which are essential for the operations and administration of the grantee's RLF program.

against all grant programs does not exceed 100% of the cost item being allocated. Compensation of members of an RLF loan board is discussed under “RLF Loan Board Compensation” below.

Leasing Transactions: The accounting and financial reporting treatment for lease agreements depend on whether the lease is classified as a capital lease or an operating lease.

An *operating lease* is a rental agreement requiring periodic payments for the use of an asset during a given period of time. An operating lease does not transfer a material equity in the property leased. The rent payments under an operating lease are allowable to the extent that the lease rate is reasonable when compared with area market conditions.

A *capital lease* is a rental agreement where the lessee acquires a substantial portion of the rights to an asset. In substance, a capital lease represents the purchase of the asset. Financial Accounting Standards Board (FASB) Statement Number 13, Accounting for Leases, as amended, provides guidelines for capital lease transactions. The periodic payments under a capital lease are reimbursable up to the amount that would be allowed had the organization purchased the property on the date the lease agreement was executed. For example, reimbursable expenses could include depreciation or use allowances, maintenance, taxes and insurance, but excluding any unallowable costs.

For lease agreements between *related parties*, a determination must be made whether the related parties are required to prepare financial reports as a single reporting entity. If reporting as a single entity is required for financial reporting purposes, the assets of the organizations shall be combined, and any reimbursable expenses between the parties shall be computed based upon the cost of ownership. Specific financial statement disclosures pertaining to related parties are required by FASB 57, Related Party Disclosures.

Materials & Supplies: The costs of materials and supplies used during the accounting period for RLF-related activities are allowable expenses.

Outside Professional Services: The costs of RLF-related services necessary and appropriate to prudently administer and protect RLF assets are allowable. Examples of professional service providers include independent accountants, attorneys, appraisers and others who advise RLF operators and who are not officers or employees of the grantee organization or part of the grantee's department (if the grantee is a governmental entity). Professional service providers generally include those who provide loan packaging, underwriting, closing, monitoring, collections, recovery, sale, and/or protection of collateral services. Costs for professional

services are eligible for reimbursement provided they are consistent with the purpose of the grant and allocated equitably based on the benefits derived. (See applicable OMB cost principles for additional information on professional services.)

RLF Loan Board Compensation: RLF loan board members, including advisory board members, who are not employees of the grant recipient, are not eligible for compensation from RLF Income except as may be provided for in the reimbursement of travel costs consistent with the grant recipient's travel policies or in accordance with Federal Travel Regulations (see “Travel” below). Since RLF loan board members usually serve as representatives of their profession or employer organizations, compensation for other than travel-related expenses is not normally allowed. However, if there are exceptional circumstances that warrant consideration of a waiver, EDA approval may be requested.

Training: The costs of training materials, textbooks, fees charged by educational institutions, and travel costs for part-time education of employees to improve their skills and performance in the management, administration and operation of an RLF are allowable. Extended or full-time training is unallowable except when specifically authorized by EDA in advance. Travel costs to attend meetings and professional conferences are allowable when the primary purpose of the meeting or conference is the dissemination of technical information relating to the grant program.

Travel: The costs for transportation, lodging, subsistence and related items incurred by employees who are on travel status for official business related to RLF activities are allowable. Typical travel expenses might include the costs associated with visiting or meeting potential borrowers, servicing and monitoring loan projects, and meeting with bankers, accountants, attorneys and others affiliated with existing or potential RLF borrowers. It may also include the travel costs associated with marketing the RLF program or hiring RLF program personnel.

Travel costs expensed to RLF Income must be applied consistent with the travel provisions established by the grant recipient in its regular operations and with the applicable OMB cost circular. Organizational travel provisions should be documented in a policy manual. In the absence of formal travel policies, the “Federal Travel Regulations” as published in the Code of Federal Regulations shall apply.

For additional information on allowable costs, refer to applicable OMB cost principles or contact the Office of Inspector General, U.S. Department of Commerce, or EDA's Regional or Headquarter's Office.

XV. SECURITIZATION

RLF grant recipients may, with EDA's prior written consent, further the objectives of the RLF through the sale of loans or Securitization⁵ of its loan portfolio. Auditors should determine whether Securitization has occurred, and if so, whether EDA consent was obtained.

XVI. ADMINISTRATIVE COST AND LOAN RECORDS RETENTION

A. Administrative Cost Records

Records of administrative costs incurred for activities relating to the operation of the RLF shall be retained for three (3) years from the actual submission date of the last Semiannual or Annual Report which covers the period during which such costs were claimed, or for five (5) years from the date the costs were claimed, whichever is less. The retention period for records of equipment acquired in connection with the RLF shall be three (3) years from the date of disposition, replacement or transfer of the equipment.

B. Loan Records

Loan files and related documents and records shall be retained over the life of the loan and for a three (3) year period from the date of final disposition of the loan. The date of final disposition of the loan is defined as the date of: (1) full payment of the principal, interest, fees, penalties and other fees or costs associated with the loan; or (2) final settlement or write-off of any unpaid amounts associated with the loan.

C. General

If any litigation, claim, negotiation, audit or other action involving the RLF or its assets has commenced before the expiration of the three-year or five-year period, all administrative and program records pertaining to such matters shall be retained until completion of the action and the resolution of all issues which arise from it, or until the end of the regular three-year or five-year period, whichever is later.

The record retention periods described in this section are minimum periods and such prescription is not intended to limit any other record retention requirement of law or agreement. Any records retained for a period longer than so prescribed shall be available for inspection the same as records retained as prescribed. In any event, EDA will not question administrative costs claimed more than three (3) years old. However, if fraud is an issue, records must be retained until the issue is resolved.

ATTACHMENT 1—CIRCULARS, REGULATIONS & OTHER DOCUMENTS FOR AUDITS OF EDA RLF GRANTS

The OMB circulars and Federal regulations relevant to RLF grant recipients are listed in the table below for the different types of RLF grant recipients, i.e., governments, nonprofits or universities. Since these and the other documents listed on page ii are updated periodically, users must be careful to utilize the most current version available.

| Circular or regulation | Government | Nonprofit | University |
|------------------------------------|------------|-----------|------------|
| Administrative Requirements | | | |
| 15 CFR Part 24 | X | | |
| OMB Circular A-110 | | X | X |
| Cost Principles | | | |
| OMB Circular A-21 | | | X |
| OMB Circular A-87 | X | | |
| OMB Circular A-122 | | X | |
| Audit Requirements | | | |
| OMB Circular A- | X | X | X |

⁵Securitization is a financing technique of securing the investment of new capital with the stream of income generated by one or more (usually a large group of) existing loans. For EDA's purposes, the term intentionally encompasses a wide variety of techniques to access investor capital by securing those investments with the value of an exist-

ing RLF economic development loan portfolio. This deliberately broad definition covers a number of actual and potential schemes to access investor capital that appear to deviate from the more traditional definition and yet provide flexible alternatives to RLF operators for raising additional funds.

The regulations for EDA Section 209 (RLF) grants are found in Title 13 of the Code of Federal Regulations (CFR), Part 308. The Department of Commerce regulations implementing the OMB audit requirements are found in 15 CFR, Part 29.

Other duties and responsibilities of grant recipients are defined in the Special Terms and the Standard Terms and Conditions of each EDA RLF grant. Each RLF should have an RLF Plan which is included as part of the Special Terms and Conditions. The RLF Plan summarizes the RLF's lending strategy, the loan standards and the operational procedures under which an RLF will be administered.

In addition, all RLF grant recipients are required to follow policies and procedures as prescribed by EDA. The most recent are included in the prevailing EDA RLF Administrative Manual and in the RLF Standard Terms and Conditions. Both documents apply to all EDA RLF grants.

Additional Guidance for State and Local Governmental Entities Audits

American Institute of Certified Public Accountants (AICPA) Audit and Accounting Guide, Audits of State and Local Governmental Units, issued May 1, 1996.
AICPA Audit and Accounting Guide, The Not-for-Profit Organizations, issued June 1, 1996.
Government Auditing Standards, issued by the Comptroller General of the United States, 1994 revision (Yellow Book).
OMB Circular A-133, Audits of States, Local Governments and Non-Profit Organizations, issued June 30, 1997.
OMB Provisional Compliance Supplement for Single Audits (expected to be issued in late 1997).

Additional Guidance for Non-Profit Entities Audits

AICPA, Statement of Position 92-9, Audits of Not-for-Profit Organizations Receiving Federal Awards, issued December 1992. (Note: Because of significant changes to Government Auditing Standards and OMB Circular A-133, much of this is outdated. AICPA is developing a new SOP to supersede SOP 92-9).
AICPA Statement of Auditing Standards No. 74, Compliance Auditing Applicable to Governmental Entities and Other Recipients of Governmental Financial Assistance, issued February 1995.

ATTACHMENT 2—ECONOMIC DEVELOPMENT ADMINISTRATION SECTION 209 REVOLVING LOAN FUND GRANTS (CFDA 11.307)

I. PROGRAM OBJECTIVES

Revolving loan fund (RLF) grants for business development assistance are available

under Section 209 of the Public Works and Economic Development Act of 1965 (PWEDA). These grants are administered by the Economic Development Administration (EDA) to help communities adjust to sudden and severe economic dislocations and long-term economic deterioration. RLF grants provide capital to establish loan pools which finance business activities and stimulate economic development in accordance with local development strategies. RLFs typically provide financing that is not otherwise available. Loan repayments plus interest and other income replenish RLF capital to provide a revolving resource for additional loans.

II. PROGRAM PROCEDURES

RLF grants are made to EDA designated economic development districts established under Title IV of PWEDA, Indian tribes, states, cities or other political subdivisions, consortia of political subdivisions, Community Development Corporations defined in 42 U.S.C. 9802, nonprofit organizations determined to be representative of a redevelopment area, and certain specified governments. Priority consideration for RLF funding is given to those proposals which have the greatest potential to benefit areas experiencing or threatened with substantial economic distress.

III. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES

A. Types of Services Allowed or Unallowed

Compliance Requirement

Allowed Services: RLF grant and matching funds may be used only for purposes specified in the grant budget and grant agreement. Eligible uses normally include disbursements for RLF loans and the audit costs of RLF activities. Unlike grant and matching funds, RLF Income¹ may be used for RLF loans as well as for eligible RLF administrative expenses (see Section C. Earmarking below for additional details).

Suggested Audit Procedure

Review grant budget and grant agreement, and determine whether RLF funds were used for specified purposes.

¹ RLF Income includes the interest earned on loans, interest earned on accounts holding RLF funds not needed for immediate lending, loan fees received from borrowers, and other income generated from RLF activities.

B. Eligibility

Compliance Requirement

Eligibility: Eligibility for RLF assistance is based upon the following: (1) the activity financed being located in an eligible lending area (usually defined in the Special Terms and Conditions of the grant, as may be amended); and (2) the borrower being unable to obtain credit in the private capital market on terms and conditions which would permit the completion and/or successful operation of the project to be financed.

Ineligible Recipients: The RLF grant recipient cannot make a loan to itself, to related parties, or to entities that would violate the conflict of interest provisions of the grant agreement (see Section D.16. of the Standard Terms and Conditions).

Suggested Audit Procedure

Review the Special Terms and Conditions and any amendments thereto, and scan the current addresses of selected RLF borrowers to determine whether borrowers are located within the eligible lending area.

On selected borrowers, test for borrower's inability to obtain private credit by verifying the existence of a loan write-up² in the grant recipient's files. If there is a potential violation, check the RLF Administrative Manual, Section IV.B.3., for exceptions; this Section also discusses the loan write-up. No other tests are necessary.

Review the conflict of interest provisions in the Standard Terms and Conditions, review any procedures that the grant recipient may have to avoid conflicts of interest, scan loan documentation, and determine whether RLF loans were made to ineligible recipients as defined above.

C. Matching, Level of Effort, and/or Earmarking Requirements

Matching

Compliance Requirements

A matching share of nonfederal funds required is specified in the grant agreement. Matching funds must be loaned either before or proportionately with EDA grant funds. When loans are repaid, both the matching and the EDA funds must remain in the control of the grant recipient (or subrecipient) for the duration of the RLF.

²A loan write-up is a written record prepared by the RLF administrator which discusses, at a minimum, the need for providing RLF financing to a borrower. It may be supported by third party supplemental evidence as applicable and obtainable.

Suggested Audit Procedures

Determine through the grant documents and recipient accounting records that required levels of matching were met.

Determine that the funds used for matching have been retained in the RLF.

Level of Effort (Capital Utilization)

Compliance Requirements

During the revolving phase³ of an RLF grant, the grant recipient is expected to manage its RLF so at least 75 percent of the RLF's capital is in use. The size of the RLF may justify a variation from this standard percentage. Variations require EDA approval.

Suggested Audit Procedures

Determine that the percentage of outstanding loan dollars to total RLF capital complies with the prescribed usage level in the revolving phase. If the resultant percentage does not comply with the requirement, determine the duration or number of consecutive reporting periods of noncompliance. (See Section X., Capital Utilization Standard, of the EDA RLF Administrative Manual for details, and note that the reporting periods end on September 30 and March 31 of each year.)

Earmarking

Compliance Requirements

Pursuant to the prevailing EDA RLF Administrative Manual, RLF Income⁴ earned in a period may be used for lending or for RLF administrative expenses of the same period only. Any RLF Income remaining at the end of a period must be permanently added to the RLF's capital base to be used for lending. Any exceptions require EDA approval.

(Note: Prior to March 15, 1993, RLF Income was not required to be added to the RLF capital base at the end of a period. The accounting period is selected by the grant recipient and ends on either its fiscal year end or the Federal fiscal year end. Repayments of loan principal may be used only for re-lending.)

Suggested Audit Procedures

Verify that any RLF Income earned within the period has been used for such period's RLF administrative expenses, for loans, or that any unexpended RLF Income earned in the period has been added to the RLF capital base.

³The revolving phase begins after all available grant and matching funds have been initially disbursed.

⁴Defined in Footnote 1, Page ii.

D. Special Reporting Requirements

Compliance Requirements

Grant recipients electing to use RLF Income to cover all or part of an RLF's administrative expense must annually complete an "RLF Income and Expense Statement." (If the grant recipient uses more than fifty percent or more than \$100,000 of a period's RLF Income for RLF administrative expenses, the statement is submitted to EDA within 90 days of the period ending date.)

Suggested Audit Procedures

Review the procedures for preparing the report (See Section VII. of EDA RLF Administrative Manual) and evaluate for adequacy.

E. Special Tests and Provisions

Compliance Requirements

RLF grant recipients are expected to follow lending practices generally accepted as prudent for public lending programs.

Suggested Audit Procedures

Review the grant recipient's RLF Plan for loan disbursement and collection procedures. Determine whether these procedures are being followed.

During the Disbursement Phase⁵ of an RLF grant, a grant recipient must demonstrate there is sufficient RLF loan activity to draw grant funds within the approved period allotted. This usually is in accordance with the following schedule: 50% of grant and matching funds disbursed within 18 months of the grant award, 80% within two (2) years, and 100% within three (3) years. Any time extensions require EDA's approval. By law, grant funds remain available for disbursement by EDA only until September 30 of the fifth year after the fiscal year of the grant award.

F. Preservation of Government's Interest in Assets

Compliance Requirements

In instances where RLF grant recipients elect to Securitize their loan portfolios, EDA's prior written consent must be obtained and the value of the Federal Government's reversionary interest in assets retained.

Suggested Audit Procedures

Review grant recipients records where Securitization may have occurred and determine whether grantee obtained EDA's written consent as required.

⁵The Disbursement Phase is defined as the approved time period for drawing all EDA grant funds.

PARTS 309–313 [RESERVED]

PART 314—PROPERTY

Subpart A—In General

Sec.

- 314.1 Federal interest, applicability.
- 314.2 Definitions.
- 314.3 Use of property.
- 314.4 Unauthorized use.
- 314.5 Federal share.
- 314.6 Encumbrances.

Subpart B—Real Property

- 314.7 Title.
- 314.8 Recorded statement.

Subpart C—Personal Property

- 314.9 Recorded statement—Title.
- 314.10 Revolving loan funds.

Subpart D—Release of EDA's Property Interest

- 314.11 Procedures for release of EDA's property interest.

AUTHORITY: 42 U.S.C. 3211; 19 U.S.C. 2341–2355; 42 U.S.C. 6701; 42 U.S.C. 184; Department of Commerce Organization Order 10–4.

SOURCE: 64 FR 5476, Feb. 3, 1999, unless otherwise noted.

Subpart A—In General

§314.1 Federal interest, applicability.

(a) Property that is acquired or improved with EDA grant assistance shall be held in trust by the recipient for the benefit of the purposes of the project under which the property was acquired or improved. Limited exceptions to this requirement are listed in §314.7(c).

(b) During the estimated useful life of the project, EDA retains an undivided equitable reversionary interest in property acquired or improved with EDA grant assistance, except for the exceptions listed in §314.7(c).

(c) EDA may approve the substitution of an eligible entity for a recipient. The original recipient remains responsible for the period it was the recipient, and the successor recipient holds the project property with the responsibilities of an original recipient under the award.

§ 314.2 Definitions.

As used in this part 314 of this chapter:

Dispose includes sell, lease, abandon, or use for a purpose or purposes not authorized under the grant award or this part.

Estimated useful life means that period of years, determined by EDA as the expected lifespan of the project.

Owner includes fee owner, transferee, lessee, or optionee of real property upon which project facilities or improvements are or will be located, or real property improved under a project which has as its purpose that the property be sold or leased.

Personal Property means all property other than real property.

Project means the activity and property acquired or improved for which a grant is awarded. When property is used in other programs as provided in § 314.3(b), "project" includes such programs.

Property includes all forms of property, real, personal (tangible and intangible), and mixed.

Real property means any land, improved land, structures, appurtenances thereto, or other improvements, excluding movable machinery and equipment. Improved land also includes land which is improved by the construction of such project facilities as roads, sewers, and water lines which are not situated directly on the land but which contribute to the value of such land as a specific part of the project purpose.

Recipient includes any recipient of grant assistance under the Public Works and Economic Development Act of 1965, as amended, prior to or as amended by Public Law 105-393, or under Title II, Chapters 3 and 5 of the Trade Act of 1974, Title I of the Public Works Employment Act of 1976, the Public Works Employment Act of 1977, or the Community Emergency Drought Relief Act of 1977, and any EDA-approved successor to such recipient.

§ 314.3 Use of property.

(a) The recipient or owner must use any property acquired or improved in whole or in part with grant assistance only for the authorized purpose of the project and such property must not be leased, sold, disposed of or encumbered

without the written authorization of EDA.

(b) However, in the event that EDA and the recipient determine that property acquired or improved in whole or in part with grant assistance is no longer needed for the original grant purpose, it may be used in other Federal grant programs, or programs that have purposes consistent with those authorized for support by EDA, but only if EDA approves such use.

(c) When the authorized purpose of the EDA grant is to develop real property to be leased or sold, as determined by EDA, such sale or lease is permitted provided it is for adequate consideration and the sale is consistent with the authorized purpose of the grant and with applicable EDA requirements concerning, but not limited to, non-discrimination and environmental compliance. The term "adequate consideration" means consideration that is fair and reasonable under the circumstances of the sale or lease, and may include money, services, property exchanges, contractual commitments, or acts of forbearance.

(d) When acquiring replacement personal property of equal or greater value, the recipient may, with EDA's approval, trade-in the property originally acquired or sell the original property and use the proceeds in the acquisition of the replacement property, provided that the replacement property shall be used for the project and be subject to the same requirements as the original property. In extraordinary and compelling circumstances, EDA may allow replacement of real property, with the approval of the Assistant Secretary.

[64 FR 5476, Feb. 3, 1999, as amended at 64 FR 69879, Dec. 14, 1999]

§ 314.4 Unauthorized use.

(a) Except as provided in §§ 314.3(b), (c) or (d), whenever, during the expected useful life of the project, any property acquired or improved in whole or in part with grant assistance is disposed of, or no longer used for the authorized purpose of the project, the Federal Government must be compensated by the recipient for the Federal share of the value of the property;

§314.5

provided that for equipment and supplies, the standards of the Uniform Administrative Requirements for Grants at 15 CFR parts 14 and 24 or any supplements or successors thereto, as applicable, shall apply.

(b) If property is disposed of or encumbered without EDA approval, EDA may assert its interest in the property to recover the Federal share of the value of the property for the Federal Government. To that end, EDA may take such actions as are provided in connection with loans and loan guarantees, in §316.5(c) of this chapter. EDA may pursue its rights under both paragraphs (a) and (b) of this section to recover the Federal share, plus costs and interest.

[64 FR 5476, Feb. 3, 1999, as amended at 64 FR 69879, Dec. 14, 1999]

§314.5 Federal share.

(a) For purposes of this part, the Federal share of the value of property is that percentage of the current fair market value of the property attributable to the EDA participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, incurred to put the property into condition for sale). The Federal share excludes that value of the property attributable to acquisition or improvements before or after EDA's participation in the project and not included in project costs.

(b) Where the recipient's interest in property is a leasehold for a term of years less than the depreciable remaining life of the property, that factor will be considered in determining the percentage of the Federal share.

(c) If property is transferred from the recipient to another eligible entity, as provided in §314.1(c), the Federal Government must be compensated the Federal share of any money or money equivalent paid by or on behalf of the successor recipient to or for the benefit of the original recipient, provided that EDA may first permit the recovery by the original recipient of an amount not exceeding its investment in the project nor exceeding that percentage of the value of the property that is not attributable to the EDA participation in the project.

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(d) When the Federal Government is fully compensated for the Federal share of the value of property acquired or improved in whole or in part with grant assistance, EDA has no further interest in the ownership, use, or disposition of the property.

§314.6 Encumbrances.

(a) Except as provided in §314.6(c), recipient-owned property acquired or improved in whole or in part with grant assistance may not be used to secure a mortgage or deed of trust or otherwise be used as collateral or encumbered except to secure a grant or loan made by a State or Federal agency or other public body participating in the same project. This provision does not prevent projects from being developed on previously encumbered property, if the requirements of §314.7(b) are met.

(b) Encumbering project property other than as permitted in this section is an unauthorized use of the property requiring compensation to the Federal Government as provided in §§314.4 and 314.5.

(c) EDA may waive the provisions of §314.6(a) for good cause when EDA determines all of the following:

(1) All proceeds from the grant/loan to be secured by the encumbrance on the property shall be available only to the recipient, and all proceeds from such secured grant/loan shall be used only on the project for which the EDA grant was awarded or on related activities of which the project is an essential part;

(2) The grantor/lender would not provide funds without the security of a lien on the project property; and

(3) There is a reasonable expectation that the borrower/recipient will not default on its obligation.

(d) EDA may waive the provisions of §314.6(a) as to an encumbrance on property which is acquired and/or improved by an EDA grant when EDA determines that the encumbrance arises solely from the requirements of a pre-existing water or sewer facility or other utility encumbrance which by its terms extends to additional property connected to such facilities.

Subpart B—Real Property**§ 314.7 Title.**

(a) The recipient must hold title to the real property required for a project, except in limited cases as provided in paragraph 314.7(c) of this section. Except in those limited cases, the recipient must furnish evidence, satisfactory in form and substance to EDA, that title to real property required for a project (other than property of the United States) is vested in the recipient, and that such easements, rights-of-way, State permits, or long-term leases as are required for the project have been or will be obtained by the recipient within an acceptable time as determined by EDA.

(b)(1) The recipient must disclose to EDA all:

- (i) Liens,
- (ii) Mortgages,
- (iii) Other encumbrances,
- (iv) Reservations,
- (v) Reversionary interests, or
- (vi) Other restrictions on title or the recipient's interest in the property.

(2) No such encumbrance or restriction will be acceptable if, as determined by EDA, the encumbrance or restriction will interfere with the construction, use, operation or maintenance of the project during its estimated useful life.

(c) EDA may determine that a long-term leasehold interest for a period not less than the estimated useful life of the project, or an agreement for the recipient to purchase the property, will be acceptable, but only if fee title is not obtainable and the lease or purchase agreement provisions adequately safeguard the Federal Government's interest in the project. Also, EDA may permit the following exceptions to the requirement that the recipient hold title to the real property required for a project.

(1) When a project includes construction within a railroad's right-of-way or over a railroad crossing, it may be acceptable for the work to be completed by the railroad and for the railroad to continue to own, operate and maintain that portion of the project, if required by the railroad, and provided that this is a minor but essential component of the project.

(2) When a project includes construction on a State-owned or local government-owned highway, it may be acceptable for the State or local government to own, operate and maintain that portion of the project, if required by the State or local government, provided that this is a minor but essential component of the project, the construction is completed in accordance with EDA requirements, and the State or local government provides assurances to EDA:

(i) That the State or local government will operate and maintain the improvements for the useful life of the project as determined by EDA;

(ii) That the State or local government will not sell the improvements for the useful life of the project, as determined by EDA; and

(iii) That the use of the property will be consistent with the authorized purpose of the project.

(3) When the authorized purpose of the project is to construct facilities to serve industrial or commercial parks or sites owned by the recipient for sale or lease to private parties, such sale or lease is permitted so long as EDA requirements continue to be met. EDA may require evidence that the recipient has title to the park or site prior to such sale or lease.

(4) When the authorized purpose of the project is to construct facilities to serve privately owned industrial or commercial parks or sites for sale or lease, such ownership, sale or lease is permitted so long as EDA requirements continue to be met. EDA may require evidence that the private party has title to the park or site prior to such sale or lease, and may condition the award of project assistance upon assurances by the private party relating to the sale or lease that EDA determines are necessary to assure consistency with the project purposes.

§ 314.8 Recorded statement.

(a) For all projects involving the acquisition, construction or improvement of a building, as determined by EDA, the recipient shall execute a lien, covenant or other statement of EDA's interest in the property acquired or improved in whole or in part with the funds made available under the award.

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The statement shall specify in years the estimated useful life of the project and shall include, but not be limited to disposition, encumbrance, and compensation of Federal share requirements of this part 314. The statement shall be satisfactory in form and substance to EDA.

(b) The statement of EDA's interest must be perfected and placed of record in the real property records of the jurisdiction in which the property is located, all in accordance with local law.

(c) Facilities in which the EDA investment is only a small part of a large project, as determined by EDA, may be exempted from the requirements of this section.

Subpart C—Personal Property

§ 314.9 Recorded statement—Title.

For all projects which EDA determines involve the acquisition or improvement of significant items of tangible personal property, including but not limited to ships, machinery, equipment, removable fixtures or structural components of buildings, the recipient shall execute a security interest or other statement of EDA's interest in the property, acceptable in form and substance to EDA, which statement must be perfected and placed of record in accordance with local law, with continuances refiled as appropriate. Whether or not a statement is required by EDA to be recorded, the recipient must hold title to the personal property acquired or improved as part of the project, except as otherwise provided in this part.

§ 314.10 Revolving loan funds.

(a) With EDA's consent, recipients holding revolving loan fund (RLF) property (including but not limited to money, notes, and security interests) may sell such property or encumber such property as part of a securitization of the RLF portfolio. The net transaction proceeds must be used for additional loans as part of the RLF project;

(b) When a recipient determines that it is no longer necessary or desirable to operate an RLF, the RLF may be terminated; provided that, unless otherwise stated in the award, the recipient

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must compensate the Federal Government for the Federal share of the value of the RLF property. The Federal share is that percentage of the capitalized RLF contributed by EDA applied to all RLF property, including the present value of all outstanding loans. However, with EDA's prior approval, upon termination the recipient may use for other economic development purposes that portion of such RLF property that EDA determines is attributable to the payment of interest.

Subpart D—Release of EDA's Property Interest

§ 314.11 Procedures for release of EDA's property interest.

(a) Before the expiration of the estimated useful life of the grant project, EDA may release, in whole or in part, any real property interest, or tangible personal property interest, in connection with a grant after the date that is 20 years after the date on which the grant was awarded. (The term "tangible personal property" excludes debt instruments, currency, and accounts in financial institutions.) Except as provided in paragraph (b) of this section, such release is not automatic; it requires EDA's approval, which will not be withheld except for good cause. The release may be unconditional, or may be conditioned upon some activity of the recipient intended to be pursued as a consequence of the release.

(b) EDA hereby releases all of its real and tangible personal property interests in projects awarded under the Public Works Employment Act of 1976 (Pub. L. 94-369) and under that act as amended by the Public Works Employment Act of 1977 (Pub. L. 95-28).

(c)(1) Notwithstanding §§ 314.11(a) and (b), in no event, either before or after the release of EDA's interest, may project property be used:

(i) In violation of the nondiscrimination requirements of the project award, or

(ii) For religious purposes prohibited by the holding of the U.S. Supreme Court in *Tilton v. Richardson*, 403 U.S. 672 (1971).

(2) Such use voids the release, and is an unauthorized use of the property, as provided in § 314.4.

PART 315—CERTIFICATION AND ADJUSTMENT ASSISTANCE FOR FIRMS

Subpart A—General Provisions

Sec.

- 315.1 Purpose and scope.
- 315.2 Definitions.
- 315.3 Confidential business information.
- 315.4 Eligible applicants.
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- 315.10 Processing petitions for certification.
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- 315.12 Termination of certification and procedure.
- 315.13 Loss of certification benefits.

Subpart D—Assistance to Industries

- 315.14 Assistance to firms in import-impacted industries.

AUTHORITY: 42 U.S.C. 3211; 19 U.S.C. 2391, *et seq.*; 42 U.S.C. 5141; E.O. 12372; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5478, Feb. 3, 1999, unless otherwise noted.

Subpart A—General Provisions

§ 315.1 Purpose and scope.

The regulations in this part implement certain changes to responsibilities of the Secretary of Commerce under Chapter 3 of Title II of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*) (Trade Act), concerning adjustment assistance for firms. The statutory authority and responsibilities of the Secretary of Commerce relating to adjustment assistance are delegated to EDA. EDA has the duties of certifying firms as eligible to apply for adjustment assistance, providing technical adjustment assistance to eligible recipients, and providing assistance to organizations representing trade injured industries.

§ 315.2 Definitions.

As used in this part 315 of this chapter:

Adjustment assistance is technical assistance provided to firms or industries under Chapter 3 of Title II of the Trade Act.

Adjustment proposal means a certified firm's plan for improving its economic situation.

Certified firm means a firm which has been determined by EDA to be eligible to apply for adjustment assistance.

Confidential business information means information submitted to EDA or TAACs by firms that concerns or relates to trade secrets for commercial or financial purposes which is exempt from public disclosure under 5 U.S.C. 552(b)(4), 5 U.S.C. 552b(c)(4) and 15 CFR part 4.

Decreased absolutely means a firm's sales or production has declined:

- (1) Irrespective of industry or market fluctuations; and
- (2) Relative only to the previous performance of the firm.

Directly competitive means:

- (1) Articles which are substantially equivalent for commercial purposes, i.e., are adapted to the same function or use and are essentially interchangeable; and
- (2) Oil or natural gas (exploration, drilling or otherwise produced).

Firm means an individual proprietorship, partnership, joint venture, association, corporation (including a development corporation), business trust, cooperative, trustee in bankruptcy or receiver under court decree and including fishing, agricultural entities and those which explore, drill or otherwise produce oil or natural gas. When a firm owns or controls other firms as described below, for purposes of receiving benefits under this part, the firm and such other firms may be considered a single firm when they produce like or directly competitive articles or are exerting essential economic control over one or more production facilities. Such other firms include:

- (1) Predecessor;
- (2) Successor;
- (3) Affiliate; or
- (4) Subsidiary.

A group of workers threatened with total or partial separation means there is

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reasonable evidence that such total or partial separation is imminent.

Like articles means articles which are substantially identical in their intrinsic characteristics.

Partial separation means either:

(1) A reduction in an employee's work hours to 80 percent or less of the employee's average weekly hours during the year of such reductions as compared to the preceding year; or

(2) A reduction in the employee's weekly wage to 80 percent or less of his/her average weekly wage during the year of such reduction as compared to the preceding year.

Person means individual, organization or group.

The record means:

(1) A petition for certification of eligibility to qualify for adjustment assistance;

(2) Any supporting information submitted by the petitioner;

(3) Report of the EDA investigation in regard to the petition; and

(4) Any information developed during the investigation or in connection with any public hearing held on the petition.

Recipient means a firm, Trade Adjustment Assistance Center or other party receiving adjustment assistance or through which adjustment assistance is provided under the Trade Act.

A significant number or proportion of workers means 5 percent of the firm's work force or 50 workers, whichever is less. An individual farmer is considered a significant number or proportion of workers.

Substantial interest means a direct, material, economic interest in the certification or noncertification of the petitioner.

Technical Assistance means assistance provided to firms or industries under Chapter 3 of Title II of the Trade Act.

A totally separated worker means an employee who has been laid off or whose employment has been terminated by his/her employer for lack of work.

§ 315.3 Confidential business information.

EDA will follow the procedures set forth in 15 CFR § 4.7, and submitters

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should so designate any information they believe confidential.

§ 315.4 Eligible applicants.

(a) Trade Adjustment Assistance Centers (TAACs) are eligible applicants. A TAAC can be:

(1) A university affiliate;

(2) State or local government affiliate;

(3) Non-profit organization.

(b) Firms;

(c) Organizations assisting or representing industries in which a substantial number of firms or workers have been certified as eligible to apply for adjustment assistance under sections 223 or 251 of the Trade Act including the following:

(1) Existing agencies;

(2) Private individuals;

(3) Firms;

(4) Universities;

(5) Institutions;

(6) Associations;

(7) Unions; or

(8) Other non-profit industry organizations.

§ 315.5 Selection process.

(a) TAACs are selected in accordance with the following:

(1) Currently funded TAACs are invited by EDA to submit either new or amended applications, provided they have performed in a satisfactory manner and complied with previous and/or current conditions in their cooperative agreements with EDA and contingent upon availability of funds. Such TAACs shall submit an application on a form approved by OMB, as well as a proposed budget, narrative scope of work, and such other information as requested by EDA. Acceptance of an application or amended application for a cooperative agreement does not assure funding by EDA; and

(2) New TAACs will be invited to submit proposals, and if they are acceptable, EDA will invite an application on a form approved by OMB. An application will be accompanied by a narrative scope of work, proposed budget and such other information as requested by EDA. Acceptance of an application does not assure funding by EDA.

(b) Firms are selected in accordance with the following:

(1) Firms may apply for certification generally through a TAAC by filling out a petition for certification. The TAAC will provide technical assistance to firms wishing to fill out such petitions;

(2) Once firms are certified in accordance with the procedures described in §§ 315.9 and 315.10, an adjustment proposal is usually prepared with technical assistance from a party independent of the firm, usually the TAAC, and submitted to EDA;

(3) Certified firms which have submitted acceptable adjustment proposals within the time limits described in § 315.13 below, may begin implementation of such proposal, generally through the TAAC and often with Technical Assistance from the TAAC, by submitting a request to the TAAC to provide assistance in implementing an accepted adjustment proposal; and

(4) EDA determines whether or not to provide assistance for adjustment proposals based upon § 315.6(c)(2).

(c) Organizations representing trade injured industries must meet with an EDA representative to discuss the industry problems, opportunities and assistance needs, and if invited by EDA may then submit an application as approved by OMB, as well as a scope of work and proposed budget.

§ 315.6 Evaluation criteria.

(a) Currently funded TAACs are generally evaluated based on the following:

(1) How well they have performed under cooperative agreements with EDA and if they are in compliance with the terms and conditions of such cooperative agreements;

(2) Proposed scope of work, budget and application or amended application; and

(3) The availability of funds.

(b) New TAACs are generally evaluated on the following:

(1) Demonstrates competence in administering business assistance programs;

(2) Background and experience of staff;

(3) Proposed scope of work, budget and application; and

(4) The availability of funding.

(c) Firms are generally evaluated based on the following:

(1) For certification, firms' petitions are selected strictly on the basis of conformance with requirements set forth in § 315.9 below;

(2) An adjustment proposal is evaluated on the basis of the following:

(i) The proposal must be submitted to EDA within 2 years after the date of the certification of the firm; and

(ii) The adjustment proposal must include a description of any technical assistance requested to implement such proposal including financial and other supporting documentation as EDA determines is necessary, based upon either:

(A) An analysis of the firm's problems, strengths and weaknesses and an assessment of its prospects for recovery; or

(B) If EDA so determines, an acceptable adjustment proposal can be prepared on the basis of other available information.

(iii) The adjustment proposal must be evaluated to determine that it:

(A) Is reasonably calculated to contribute materially to the economic adjustment of the firm, i.e., that such proposal will be a constructive aid to the firm in establishing a competitive position in the same or a different industry;

(B) Gives adequate consideration to the interests of a sufficient number of separated workers of the firm, by providing for example that the firm will:

(1) Give a rehiring preference to such workers;

(2) Make efforts to find new work for a number of such workers; and

(3) Assist such workers in obtaining benefits under available programs.

(C) Demonstrates that the firm will make all reasonable efforts to use its own resources for economic development, though under certain circumstances, resources of related firms or major stockholders will also be considered.

(d) Organizations representing trade injured industries must demonstrate that the industry is injured by increased imports and that the activities to be funded will yield some short-term

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actions that the industry itself (and individual firms) can and will take toward the restoration of the industry's international competitiveness.

(1) The emphasis is on practical results that can be implemented in the near term, and long-term research and development activities are given low priority.

(2) It is also expected that the industry will continue activities on its own without the need for continued Federal assistance.

§ 315.7 Award requirements.

(a) Award periods are as follows:

(1) TAACs are generally funded for 12 months;

(2) Firms are generally provided assistance over a 2-year period; and

(3) Organizations representing trade injured industries are generally funded for 12 months.

(b) Matching requirements are as follows:

(1) There are no matching requirements for certification assistance provided by the TAACs to firms or for administrative expenses for the TAACs;

(2) All adjustment proposals and implementation assistance must include not less than 25% nonfederal match, provided to the extent practicable, by firms being assisted; and

(3) Contributions of at least 50% of the total project cash cost, in addition to appropriate in kind contributions, are expected from organizations representing trade injured industries.

Subpart B—Trade Adjustment Assistance Centers

§ 315.8 Purpose and scope.

(a) Trade Adjustment Assistance Centers (TAACs) are available to assist firms in all fifty states, the District of Columbia and the Commonwealth of Puerto Rico in obtaining adjustment assistance. TAACs provide technical assistance in accordance with this subpart either through their own staffs or by arrangements with outside consultants. Information concerning TAACs serving particular areas can be obtained from EDA. See the annual FY NOFA for the appropriate point of contact and address.

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(b) Prior to submitting a request for technical assistance to EDA, a firm should determine the extent to which the required technical assistance can be provided through a TAAC. EDA will provide technical assistance through TAACs whenever EDA determines that such assistance can be provided most effectively in this manner. Requests for technical assistance will normally be made through TAACs.

(c) TAACs generally provide technical assistance to a firm by providing the following:

(1) Assistance to a firm in preparing its petition for certification;

(2) Assistance to a certified firm in diagnosing its strengths and weaknesses and developing an adjustment proposal for the firm; and

(3) Assistance to a certified firm in the implementation of the adjustment proposal for the firm.

Subpart C—Certification of Firms

§ 315.9 Certification requirements.

A firm will be certified eligible to apply for adjustment assistance based upon the petition for certification if EDA determines, under section 251(c) of the Trade Act, that:

(a) A significant number or proportion of workers in such firm have become totally or partially separated, or are threatened to become totally or partially separated;

(b) Either sales or production, or both of the firm have decreased absolutely; or sales or production, or both of any article that accounted for not less than 25 percent of the total production or sales of the firm during the 12-month period preceding the most recent 12-month period for which data are available have decreased absolutely; and

(c) Increases of imports (absolute or relative to domestic production) of articles like or directly competitive with articles produced by such firm contributed importantly to such total or partial separation or threat thereof, and to such decline in sales or production; provided that imports will not be considered to have contributed importantly if other factors were so dominant, acting singly or in combination, that the worker separation or threat

thereof, or decline in sales or production would have been essentially the same irrespective of the influence of imports.

§ 315.10 Processing petitions for certification.

(a) Firms are encouraged to consult with a TAAC or EDA for guidance and assistance in the preparation of their petitions for certification.

(b) A firm seeking certification shall complete a petition (OMB Control Number 0610-0091) in the form prescribed by EDA with the following information about such firm:

(1) Identification and description of the firm, including legal form of organization, economic history, major ownership interests, officers, directors, management, parent company, subsidiaries or affiliates, and production and sales facilities;

(2) Description of goods and services produced and sold;

(3) Description of imported articles like or directly competitive with those produced;

(4) Data on its sales, production and employment for the two most recent years;

(5) Copies of its audited financial statements, or if not available, unaudited financial statements and Federal income tax returns for the two most recent years;

(6) Copies of unemployment insurance reports for the two most recent years;

(7) Information concerning its major customers and their purchases; and

(8) Such other information as EDA may consider material.

(c) EDA shall determine whether the petition has been properly prepared and can be accepted. Immediately thereafter, EDA shall notify the petitioner that the petition has been accepted or advise the petitioner that the petition has not been accepted, but may be resubmitted at any time without prejudice when the specified deficiencies have been corrected and the resubmission will be treated as a new petition.

(d) A notice of acceptance of a petition shall be published in the FEDERAL REGISTER.

(e) An investigation shall be initiated by EDA to determine whether the petitioner meets requirements set forth in section 251(c) of the Trade Act and § 315.9 above. The investigation can be terminated at any time for failure to meet such requirements. A report of this investigation shall become part of the record upon which a determination of the petitioner's eligibility to apply for adjustment assistance shall be made.

(f) A petitioner may withdraw a petition for certification if a request for withdrawal is received by EDA before a certification determination or denial is made. Such firm may submit a new petition at any time thereafter in accordance with the requirements of this section and § 315.9.

(g) Following acceptance, EDA shall decide what action to take on petitions for certification as follows:

(1) Make a determination based on the record as soon as possible after all material has been submitted. In no event may the period exceed 60 days from the date on which the petition was accepted; and

(2) Either certify the petitioner eligible to apply for adjustment assistance or deny the petition, and in either event EDA shall promptly give notice of the action in writing to the petitioner. A notice to the petitioner or any parties requesting notice as specified in § 315.10(d) of a denial of a petition shall specify the reasons upon which the denial is based. If a petition is denied, the petitioner shall not be entitled to resubmit its petition within one year from the date of the denial. At the time of the denial of a petition EDA may waive the 1-year limitation for good cause.

§ 315.11 Hearings, appeals and final determinations.

(a) Any petitioner may appeal to EDA from a denial of certification provided that the appeal is received by EDA in writing by personal delivery or by registered mail within 60 days from the date of notice of denial under § 315.10(g). The appeal shall state the grounds on which the appeal is based, including a concise statement of the supporting facts and law. The decision of EDA on the appeal shall be the final

determination within the Department of Commerce. In the absence of an appeal by the petitioner under this paragraph, such final determination shall be determined under §315.10(g).

(b) A firm, its representative or any other interested domestic party aggrieved by a final determination under paragraph (a) of this section may, within 60 days after notice of such determination, begin a civil action in the United States Court of International Trade for review of such determination in accordance with section 284 of the Trade Act (19 U.S.C. 2395).

(c) EDA will hold a public hearing on an accepted petition not later than 10 days after the date of publication of the Notice of Acceptance in the FEDERAL REGISTER if requested by either the petitioner or any other person found by EDA to have a substantial interest in the proceedings, under procedures, as follows:

(1) The petitioner and other interested persons shall have an opportunity to be present, to produce evidence, and to be heard;

(2) A request for public hearing must be delivered by hand or by registered mail to EDA. A request by a person other than the petitioner shall contain:

(i) The name, address, and telephone number of the person requesting the hearing; and

(ii) A complete statement of the relationship of the person requesting the hearing to the petitioner and the subject matter of the petition, and a statement of the nature of its interest in the proceedings.

(3) If EDA determines that the requesting party does not have a substantial interest in the proceedings, a written notice of denial shall be sent to the requesting party. The notice shall specify the reasons for the denial;

(4) EDA shall publish a notice of a public hearing in the FEDERAL REGISTER, containing the subject matter, name of petitioner, and date, time and place of hearing;

(5) EDA shall appoint the presiding officer of the hearing who shall determine all procedural questions;

(6) Procedures for requests to appear are as follows:

(i) Within 5 days after publication of the Notice of Public Hearing in the

FEDERAL REGISTER, each party wishing to be heard must file a request to appear with EDA. Such request may be filed by:

(A) The party requesting such hearing;

(B) Any other party with substantial interest; or

(C) Any other party demonstrating to the satisfaction of the presiding officer that it should be allowed to be heard.

(ii) The party filing the request shall submit the names of the witnesses and a summary of the evidence it wishes to present; and

(iii) Such requests to appear may be approved as deemed appropriate by the presiding officer.

(7) Witnesses will testify in the order and for the time designated by the presiding officer, except that the petitioner shall have the opportunity to make its presentation first. After testifying, a witness may be questioned by the presiding officer or his/her designee. The presiding officer may allow any person who has been granted permission to appear to question the witnesses for the purpose of assisting him/her in obtaining relevant and material facts on the subject matter of the hearing;

(8) The presiding officer may exclude evidence which s/he deems improper or irrelevant. Formal rules of evidence shall not be applicable. Documentary material must be of a size consistent with ease of handling, transportation, and filing. Large exhibits may be used during the hearing, but copies of such exhibits must be provided in reduced size for submission as evidence. Two copies of all documentary evidence must be furnished to the presiding officer during the hearing;

(9) Briefs may be presented to the presiding officer by parties who have entered an appearance. Three copies of such briefs shall be filed with the presiding officer within 10 days of the completion of the hearing; and

(10) Procedures for transcripts are as follows:

(i) All hearings will be transcribed. Persons interested in transcripts of the hearings may inspect them at the U.S.

Department of Commerce in Washington, D.C., or purchase copies as provided in 15 CFR part 4, Public Information; and

(ii) Confidential business information as determined by EDA shall not be a part of the transcripts. Any confidential business information may be submitted directly to the presiding officer prior to the hearing. Such information shall be labeled Confidential Business Information. For the purpose of the public record, a brief description of the nature of the information shall be submitted to the presiding officer during the hearing.

§315.12 Termination of certification and procedure.

(a) Whenever EDA determines that a certified firm no longer requires adjustment assistance or for other good cause, EDA will terminate the certification and promptly publish notice of such termination in the FEDERAL REGISTER. The termination will take effect on the date specified in the Notice.

(b) EDA shall immediately notify the petitioner and shall state the reasons for such termination.

§315.13 Loss of certification benefits.

A firm may fail to obtain benefits of certification, regardless of whether its certification is terminated for any of the following reasons:

(a) Failure to submit an acceptable adjustment proposal within 2 years after date of certification. While approval of an adjustment proposal may occur after the expiration of such 2-year period, an acceptable adjustment proposal must be submitted before such expiration;

(b) Failure to submit documentation necessary to start implementation or modify its request for adjustment assistance consistent with its adjustment proposal within 6 months after approval of the adjustment proposal and 2 years have elapsed since the date of certification. If the firm anticipates that a longer period will be required to submit documentation, such longer period should be indicated in its adjustment proposal. If the firm becomes unable to submit its documentation within the allowed time, it should notify EDA in writing of the reasons for the

delay and submit a new schedule. EDA has the discretion to accept or refuse a new schedule;

(c) If the firm's request for adjustment assistance has been denied, the time period allowed for the submission of any documentation in support of such request has expired, and 2 years have elapsed since the date of certification; or

(d) Failure to diligently pursue an approved adjustment proposal, and 2 years have elapsed since the date of certification.

Subpart D—Assistance to Industries

§315.14 Assistance to firms in import-impacted industries.

(a) Whenever the International Trade Commission makes an affirmative finding under section 202(B) of the Trade Act that increased imports are a substantial cause of serious injury or threat thereof with respect to an industry, EDA shall provide to the firms in such industry, assistance in the preparation and processing of petitions and applications for benefits under programs which may facilitate the orderly adjustment to import competition of such firms.

(b) EDA may provide technical assistance, on such terms and conditions as EDA deems appropriate for the establishment of industry wide programs for new product development, new process development, export development or other uses consistent with the purposes of this part.

(c) Expenditures for technical assistance under this section may be up to \$10,000,000 annually per industry and shall be made under such terms and conditions as EDA deems appropriate.

PART 316—GENERAL REQUIREMENTS FOR FINANCIAL ASSISTANCE

Sec.

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- 316.7 Relocation assistance and land acquisition policies.
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- 316.15 Maintenance of standards.
- 316.16 Records and audits.
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AUTHORITY: 42 U.S.C. 3211; 19 U.S.C. 2391, *et seq.*; Department of Commerce Organization Order 10–4.

SOURCE: 64 FR 5482, Feb. 3, 1999, unless otherwise noted.

§ 316.1 Environment.

(a) The purpose of this section is to ensure proper environmental review of EDA's actions under PWEDA and the Trade Act and to comply with the Federal environmental statutes and regulations in making a determination that balances economic development and environmental enhancement and mitigates adverse environmental impacts to the extent possible.

(b) Environmental assessments of EDA actions will be conducted in accordance with the statutes, regulations, and Executive Orders listed below. This list will be supplemented and modified, as applicable, in EDA's annual FY NOFA.

(1) Requirements under the National Environmental Policy Act of 1969 (NEPA), Pub. L. 91–190, as amended, 42 U.S.C. 4321 *et seq.* as implemented under 40 CFR parts 1500 *et seq.* including the following:

(i) The implementing regulations of NEPA require EDA to provide public notice of the availability of project specific environmental documents such as environmental impact statements, environmental assessments, findings of no significant impact, records of decision etc., to the affected public as specified in 40 CFR 1506.6(b); and

(ii) Depending on the project location, environmental information con-

cerning specific projects can be obtained from the Environmental Officer in the appropriate Washington, D.C. or regional office listed in the NOFA;

(2) Clean Air Act, Pub. L. 88–206 as amended, 42 U.S.C. 7401 *et seq.*;

(3) Clean Water Act (Federal Water Pollution Control Act), c. 758, 62 Stat. 1152 as amended, 33 U.S.C. 1251 *et seq.*;

(4) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. 96–510, as amended, 42 U.S.C. 9601 *et seq.* and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99–499, as amended;

(5) Floodplain Management Executive Order 11988 (May 24, 1977);

(6) Protection of Wetlands Executive Order 11990 (May 24, 1977);

(7) Resource Conservation and Recovery Act of 1976, Pub. L. 94–580 as amended, 42 U.S.C. 6901 *et seq.*;

(8) Historical and Archeological Data Preservation Act, Pub. L. 86–523, as amended, 16 U.S.C. § 469a–1 *et seq.*;

(9) National Historic Preservation Act of 1966, Pub. L. 89–665, as amended, 16 U.S.C. § 470 *et seq.*;

(10) Endangered Species Act of 1973, Pub. L. 93–205, as amended, 16 U.S.C. § 1531 *et seq.*;

(11) Coastal Zone Management Act of 1972, Pub. L. 92–583, as amended, 16 U.S.C. § 1451 *et seq.*;

(12) Flood Disaster Protection Act of 1973, Pub. L. 93–234, as amended, 42 U.S.C. § 4002 *et seq.*;

(13) Safe Drinking Water Act of 1974, Pub. L. 92–523, as amended, 42 U.S.C. § 300f–j26;

(14) Wild and Scenic Rivers Act, Pub. L. 90–542, as amended, 16 U.S.C. § 1271 *et seq.*;

(15) Environmental Justice in Minority Populations and Low-Income Populations Executive Order 12898 (February 11, 1994);

(16) Farmland Protection Policy Act, Pub. L. 97–98, as amended, 7 U.S.C. § 4201 *et seq.*; and

(17) Other Federal Environmental Statutes and Executive Orders as applicable.

§ 316.2 Excess capacity.

(a) *Definitions.* For purposes of this section only the following definitions apply:

Beneficiary means a firm or group of firms, a public or private enterprise or organization that provides a commercial product or service and that directly benefits from an EDA-assisted project.

Capacity means the maximum amount of a product or service that can be supplied to the market area over a sustained period by existing enterprises through the use of present facilities and customary work schedules for the industry.

Commercial product or service means a product or service sold on the open market in competition with another provider's product or service of the same kind.

Demand means the actual quantity of a commercial product or service that users are willing to purchase in the market area served by the intended beneficiary of the EDA assisted project.

Efficient capacity means that part of capacity derived from the use of contemporary structures, machinery and equipment, designs, and technologies.

Existing competitive enterprise means an established operation which either produces or delivers the same kind of commercial product or service to all or a substantial part of the market area served by the intended beneficiary of the EDA assisted project.

Firm means any enterprise which produces or sells a commercial product or service.

Market Area means the geographic area within which commercial products or services compete for purchase by customers.

Product or service means a good, material, or commodity, or the availability of a service or facility.

Section 208 means section 208 of PWEDA.

(1) A section 208 study is a detailed economic analysis/evaluation of competitive impact.

(2) A section 208 report is a summary of supply/demand factors.

(3) A section 208 exemption may apply to a project having one or more of the characteristics listed in paragraph (e) of this section.

(b) Under section 208:

(1) No financial assistance under PWEDA shall be extended to any

project when the result would be to increase the production of products or services when there is not sufficient demand for such products or services, to employ the efficient capacity of existing competitive commercial or industrial enterprises; and

(2) When EDA considers extending assistance for a project that benefits a firm or industry that provides a commercial product or service, the beneficiary is subject to a 208 report, study, or exemption, resulting in a finding that the project will or will not violate section 208. A section 208 study or report is required, except as provided in paragraph (e) of this section.

(c) The following procedures shall be followed to the extent necessary to provide EDA with sufficient information to prepare a 208 study or report:

(1) The beneficiary shall submit, as early as possible, the following information with regard to each commercial product or service affected by the project:

(i) A detailed description of the commercial product or service;

(ii) Current and projected amount and value of annual sales or receipts;

(iii) Market area; and

(iv) Name of other suppliers and amount of commercial product or service presently available in the market area.

(2) If the beneficiary has conducted or commissioned a relevant market study, it shall be made available to EDA as early as possible, for possible use by EDA in the 208 study or report.

(d) A section 208 report will form an acceptable basis on which to make a section 208 compliance finding when the beneficiary's projected new or additional annual output is less than one percent of the last recorded annual output in the market area, or when it is otherwise apparent that a 208 study is not required to determine that the project will not violate section 208.

(e) Unless EDA determines that circumstances require a section 208 study or report, EDA will make a finding of compliance with section 208 without doing a section 208 report or study for those projects with known beneficiaries, and which have one or more of the following characteristics:

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(1) The project is primarily for the use and benefit of the community as a whole without significantly expanding the output of commercial products or services;

(2) The project is primarily to be used for non-production or non-distribution purposes;

(3) The project will replace or restore capacity recently destroyed by flood, fire, wind, or other natural disaster, without contributing to significant expansion of the previously existing supply of the same kinds of commercial products or services;

(4) The project will assure the retention of physical capacity and/or employment without significantly expanding the existing supply of the same kinds of commercial products or services;

(5) The project will assure the reopening of facilities closed within two years of the date of reopening, if the facility will provide the same kinds of products or services as previously provided, without a significant increase in output;

(6) The project will replace, rebuild or modernize, within the same commuting area, facilities which within the previous two years have been, or are to be, displaced by official governmental action, without a change in the kind or significant increase in output of the commercial product or service previously provided;

(7) The project assures completion of a project previously assisted by EDA, where further funding is required because of revised project cost estimates, rather than for additional productive capacity;

(8) The project is wholly or primarily for planning, technical assistance, research, evaluation, other studies, or for the training of workers, and not for the direct benefit of a firm or an industry that produces a commercial product or service; or

(9) No firm benefitted by the project will use 50 percent or more of any EDA-financed service or facility.

[64 FR 5482, Feb. 3, 1999, as amended at 64 FR 69879, Dec. 14, 1999]

§316.3 Nonrelocation.

(a) General requirements for non-relocation for funding under PWEDA are as follows:

(1) EDA financial assistance will not be used to assist employers who transfer jobs from one commuting area to another. A commuting area ("area") is that area defined by the distance people travel to work in the locality of the project receiving EDA financial assistance;

(2) Every applicant for EDA financial assistance has an affirmative duty to inform EDA of any employer who will benefit from such assistance who will transfer jobs (not persons) in connection with the EDA grant;

(3) EDA will determine compliance with this requirement prior to grant award based upon information provided by the applicant during the project selection process; and

(4) Each applicant and identified primary beneficiary of EDA assistance, which for purposes of this section means an entity providing economic justification for the project, must submit its certification of compliance with this section, and other applicable information as determined by EDA.

(b) The nonrelocation requirements stated in paragraph (a) of this section shall not apply to businesses which:

(1) Relocated to the area prior to the date of the applicant's request for EDA assistance;

(2) Have moved or will move into the area primarily for reasons which have no connection to the EDA assistance;

(3) Will expand employment in the area where the project is to be located substantially beyond employment in the area in which the business had originally been located;

(4) Are relocating from technologically obsolete facilities to be competitive;

(5) Are expanding into the new area by adding a branch, affiliate, or subsidiary while maintaining employment levels in the old area or areas; or

(6) Are determined by EDA to be exempt.

§316.4 Procedures in Disaster Areas.

When non-statutory EDA administrative or procedural conditions for financial assistance awards cannot be met

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by applicants under PWEDA as the result of a disaster, EDA may waive such conditions.

§ 316.5 Project servicing for loans and loan guarantees.

EDA will provide project servicing to borrowers and lenders who received EDA loans and/or guaranteed loans under any programs administered by EDA. This includes but is not limited to loans under PWEDA prior to the effective date of Public Law 105-393, the Trade Act and the Community Emergency Drought Relief Act of 1977.

(a) EDA will continue to monitor such loans and guarantees in accordance with the loan or guarantee program.

(b) Borrowers/lenders shall submit to EDA any requests for modifications of their agreements with EDA. EDA shall, in accordance with applicable laws and policies, including the Federal Credit Reform Act of 1990 (2 U.S.C. 661c(e)), consider and respond to such modification requests.

(c) In the event that EDA determines it necessary or desirable to take actions to protect or further the interests of EDA in connection with loans or guarantees made or evidences of indebtedness purchased, EDA may:

(1) Assign or sell at public or private sale, or otherwise dispose of for cash or credit, in its discretion and upon such terms and conditions as it shall determine to be reasonable, any evidence of debt, contract, claim, personal or real property, or security assigned to or held by it in connection with financial assistance extended;

(2) Collect or compromise all obligations assigned to or held by it in connection with EDA financial assistance projects until such time as such obligations may be referred to the Attorney General for suit or collection; and

(3) Take any and all other actions determined by it to be necessary or desirable in purchasing, servicing, compromising, modifying, liquidating, or otherwise administratively dealing with or realizing on loans or guaranties made or evidences of indebtedness purchased.

§ 316.6 Public information.

The rules and procedures regarding public access to the records of the Eco-

nomic Development Administration are found at 15 CFR part 4.

§ 316.7 Relocation assistance and land acquisition policies.

Recipients of EDA financial assistance under PWEDA and the Trade Act (States and political subdivisions of States and non-profits as applicable) are subject to requirements set forth at 15 CFR part 11.

§ 316.8 Additional requirements; Federal policies and procedures.

Recipients, as defined under § 314.2 of this chapter, are subject to all Federal laws and to Federal, Department of Commerce, and EDA policies, regulations, and procedures applicable to Federal financial assistance awards, including 15 CFR part 24, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, or 15 CFR part 14, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Other Non-Profit and Commercial Organizations, whichever is applicable.

§ 316.9 Amendments and changes.

(a) Requests by recipients for amendments to a grant shall be submitted in writing to EDA for approval, and shall contain such information and documentation necessary to justify the request.

(b) Any changes made without approval by EDA are made at grantee's own risk of suspension or termination of the project.

(c) Changes of project scope after the time the project grant funds could be obligated will not be approved by EDA. In most cases, project grant funds cannot be obligated after September 30 of the fiscal year the grant is awarded.

§ 316.10 Preapproval award costs.

Project activities carried out before approval of an application by EDA are carried out at the sole risk of the applicant. Such activity could result in rejection of such project application, the disallowance of costs, or other adverse consequences as a result of non-compliance with Federal requirements, including, but not limited to, civil rights requirements, Federal labor standards,

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or Federal environmental, historic preservation or related requirements.

§ 316.11 Intergovernmental review of projects.

(a) When the applicant is not a State, Indian tribe or other general-purpose governmental authority, the applicant must afford the appropriate general purpose local governmental authority of the area a minimum of 15 days in which to review and comment on a proposed project under EDA's public works and economic adjustment programs. Under these programs, applicants shall furnish the following with their application: if no comments were received, a statement of the efforts made to obtain such comments; or, if comments were received, a copy of the comments and a statement of any actions taken to address such comments.

(b) Applicants as appropriate, must also give State and local governments a reasonable opportunity to review and comment on the proposed project if the State has a Single Point of Contact review process, including comments from areawide planning organizations in metropolitan areas as provided for in 15 CFR part 13.

[64 FR 5482, Feb. 3, 1999, as amended at 64 FR 69879, Dec. 14, 1999]

§ 316.12 Fees for paying attorneys and consultants.

Grant funds must not be used directly or indirectly to pay for attorney's or consultant's fees in connection with obtaining grants and contracts for projects funded under PWEDA.

§ 316.13 Economic development information clearinghouse.

EDA will provide assistance and information as follows:

(a) Maintain a central information clearinghouse on matters relating to economic development, economic adjustment, disaster recovery, defense conversion, and trade adjustment programs and activities of the Federal and State governments, including political subdivisions of States;

(b) Assist potential and actual applicants for economic development, economic adjustment, disaster recovery, defense conversion, and trade adjustment assistance under Federal, State,

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and local laws in locating and applying for the assistance; and

(c) Assist areas described in § 301.2(b) and other areas by providing to interested persons, communities, industries, and businesses in the areas any technical information, market research, or other forms of assistance, information, or advice that would be useful in alleviating or preventing conditions of excessive unemployment or underemployment in the areas.

§ 316.14 Project administration, operation, and maintenance.

EDA shall approve Federal assistance under PWEDA only if satisfied that the project for which Federal assistance is granted will be properly and efficiently administered, operated, and maintained.

§ 316.15 Maintenance of standards.

In accordance with sec. 602 of PWEDA all laborers and mechanics employed by contractors or subcontractors on public projects assisted by EDA under PWEDA shall be paid in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5).

§ 316.16 Records and audits.

(a) Each recipient of Federal assistance under PWEDA shall keep such records as the Secretary shall require, including records that fully disclose—

(1) The amount and the disposition by the recipient of the proceeds of the assistance;

(2) The total cost of the project in connection with which the assistance is given or used;

(3) The amount and nature of the portion of the cost of the project provided by other sources; and

(4) Such other records as will facilitate an effective audit.

(b) Access to books for examination and audit—The Secretary, the Inspector General of the Department, and the Comptroller General of the United States, or any duly authorized representative, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipient that relate to assistance received under PWEDA.

§ 316.17 Acceptance of certifications by applicants.

EDA will accept an applicant's certifications, accompanied by evidence satisfactory to EDA, that the applicant meets the requirements of PWEDA. Each applicant must include in such evidence satisfactory information that any non-Federal funds (or eligible Federal funds) required to match the EDA share of project costs are committed to the project and will be available as needed.

§ 316.18 Reports by recipients.

(a) In general, each recipient of assistance under PWEDA must submit reports to EDA at such intervals and in such manner as EDA shall require, except that no report shall be required to be submitted more than 10 years after the date of closeout of the assistance award.

(b) Each report must contain an evaluation of the effectiveness of the economic assistance provided in meeting the need that the assistance was designed to address and in meeting the objectives of PWEDA.

§ 316.19 Project administration by District organization.

When an Economic Development District is not a recipient or co-recipient of an award for a project involving construction, the District organization may administer the project for such recipient if the following conditions are met, as determined by EDA:

(a) The recipient has requested (either in the application or by separate written request) that the district organization for the area in which the project is located perform the project administration;

(b) The recipient certifies and EDA finds that:

(1) Administration of the project is beyond the capacity of the recipient's current staff to perform and would require hiring additional staff or contracting for such services,

(2) No local organization/business exists that would be able to administer the project in a more efficient or cost-effective manner than the staff of the district, and

(3) The staff of the district would administer the project themselves, without subcontracting the work out;

(c) EDA approves the request either by approving the application in which the request is made, or by separate specific written approval; and

(d) The allowable costs for the administration of the project by the district organization staff will not exceed the customary and reasonable amount that would be allowable if the district were the recipient.

PART 317—CIVIL RIGHTS

AUTHORITY: 42 U.S.C. 3211; 42 U.S.C. 2000d-1; 29 U.S.C. 794; 42 U.S.C. 3123; 42 U.S.C. 6709; 20 U.S.C. 1681; 42 U.S.C. 6101; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5485, Feb. 3, 1999, unless otherwise noted.

§ 317.1 Civil rights.

(a) Discrimination is prohibited in programs receiving federal financial assistance from EDA in accordance with the following authorities:

(1) Section 601 of Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. 2000d *et seq.* (proscribing discrimination on the basis of race, color, or national origin), and the Department of Commerce's implementing regulations found at 15 CFR part 8;

(2) 42 U.S.C. 3123 (proscribing discrimination on the basis of sex);

(3) 29 U.S.C. 794, as amended, and the Department of Commerce's implementing regulations found at 15 CFR part 8b (proscribing discrimination on the basis of disabilities);

(4) 42 U.S.C. 6101, as amended, and the Department of Commerce's implementing regulations found at 15 CFR part 20; and

(5) 42 U.S.C. 6709 (proscribing discrimination on the basis of sex under the Local Public Works Program; and

(6) Other Federal statutes, regulations and Executive Orders as applicable.

(b) No recipient or other party shall intimidate, threaten, coerce, or discriminate against, any person for the purpose of interfering with any right or privilege secured by section 601 of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, Title IX

of the Education Amendments of 1972, 42 U.S.C. 3123, 42 U.S.C. 6709, and the Age Discrimination Act of 1975, or because the person has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

(c) Definitions: (1) *Other Parties* means, as an elaboration of the definition in 15 CFR part 8, entities which, or which are intended to, create and/or save 15 or more permanent jobs as a result of EDA assistance provided that they are also either specifically named in the application as benefitting from the project, or are or will be located in an EDA building, port, facility, or industrial, commercial or business park prior to EDA's final disbursement of funds awarded for the project.

(2) Additional definitions are provided in EDA's Civil Rights Guidelines and 15 CFR part 8.

(d) All recipients of EDA financial assistance under PWEDA and the Trade Act, and Other Parties are required to submit the following to EDA:

(1) Written assurances that they will comply with EDA regulations and other Department of Commerce regulations, and such other requirements as may be applicable, prohibiting discrimination;

(2) Employment data in such form and manner as determined by EDA;

(3) Information on civil rights status and involvement in charges of discrimination in employment or the provision of services during the 2 years previous to the date of submission of such data as follows:

(i) Description of the status of any lawsuits, complaints or the results of compliance reviews; and

(ii) Statement indicating any administrative findings by a Federal or State agency.

(4) Whenever deemed necessary by EDA to determine that applicants and other parties are in compliance with civil rights regulations, such applicants and other parties shall submit additional information in the form and manner requested by EDA; and

(5) In addition to employment record requirements found in 15 CFR 8.7, complete records on all employees and applicants for employment, including information on race, sex, national origin,

age, education and job-related criteria must be retained by employers and made accessible to the responsible Department official.

(e) To enable EDA to determine that there is no discrimination in the distribution of benefits in projects which provide service benefits, EDA may require that applicants submit a project service map and information on which to determine that services are provided to all segments of the area being assisted. Applicants may be required to submit any other information EDA may deem necessary for such determination.

(f) EDA assisted planning organizations must meet the following requirements:

(1) For the selection of representatives, EDA expects planning organizations and CEDS committees to take appropriate steps to ensure, where appropriate to the area, that there is adequate representation of minority and low-income populations, women, people with disabilities and Federal and State recognized American Indian tribes and that such representation is accomplished in a nondiscriminatory manner; and

(2) EDA assisted planning organizations and CEDS committees shall take appropriate steps to ensure that no individual will be subject to discrimination in employment because of their race, color, national origin, sex, age or disability.

(3) Prior to approval of EDA initial funding, and for district designations, each district and other planning organizations so supported by EDA is required to report to EDA the membership of its governing bodies, executive committees, and staff. This report shall include the following items:

(i) The total population and minority population of the area served by the organization;

(ii) A list of organizations in the area representing the interests of minorities, women, and people with disabilities;

(iii) A list of the membership of the governing board, executive committee indicating race, sex, national origin, age, and those who self-identify, as having disabilities;

(iv) A description of actions taken and methods used in its diversity efforts to promote, as much as possible, the participation of all segments of the areas served;

(v) Information regarding how they notified and provided organizations, including neighborhood associations representing the interests of minorities, women, and people with disabilities, the opportunity to select members and their own representatives;

(vi) A list of employees on the staff of the organization by name, position title, salary, funding source, and hiring data indicating race, sex, national origin, and age;

(vii) A brief summary of any economic development activities undertaken during the previous 12 months that may have impacted the covered persons in the area. This information is required with the initial application and annually thereafter for continuation planning funding.

(4) Prior to approval of continuation funding for a planning grant each district and other planning organization so supported by EDA is required to submit a report which includes the items outlined in paragraph (f)(3) of this section except items in paragraphs (f)(3)(ii) and (v), (although paragraph (f)(3)(v) may be required when changes to the boards and committees affecting minorities, women, people with disabilities have occurred), and a summary indicating the annual progress made in the diversity efforts including a list by name, race, national origin, sex, and age of all hires, promotions, terminations, and composition of applicant pools since the last reporting period and steps taken to ensure non-discrimination and to provide equal employment opportunity.

(5) In order to determine whether districts and other planning organizations supported by EDA are complying with the requirements in paragraph (f)(3), EDA shall conduct annual compliance reviews of these organizations through either an in-depth desk audit or onsite review.

(g) Applicants for Revolving Loan Funds will provide information describing the make-up of the existing or proposed RLF Loan Board members by race, national origin, gender, age, and

those who voluntarily self-identify as having disabilities. The reports submitted to EDA by RLF grantees will be used to monitor civil rights compliance. Additional information may be requested as needed to determine compliance. Compliance issues which will be reviewed and monitored include, but are not limited to, the following:

(1) The representation of minorities, women, and those who voluntarily self-identify as having disabilities, as well as the age of members on the RLF Loan Board;

(2) Recipient's plans to openly market the RLF to prospective minority, disabled, and women business borrowers; and

(3) Recipient's monitoring plans for borrowers' compliance with civil rights requirements concerning employees or applicants for employment, and/or providers of goods and services.

(h) Reporting and other procedural matters are set forth in 15 CFR parts 8, 8b, 8c, and 20 and the Civil Rights Guidelines which are available from EDA's Regional Offices. See part 300 of this chapter.

[64 FR 5485, Feb. 3, 1999, as amended at 64 FR 69880, Dec. 14, 1999]

PART 318—EVALUATIONS OF UNIVERSITY CENTERS AND ECONOMIC DEVELOPMENT DISTRICTS

Sec.

318.1 University Center performance evaluations.

318.2 Economic Development District performance evaluations.

AUTHORITY: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

SOURCE: 64 FR 5486, Feb. 3, 1999, unless otherwise noted.

§ 318.1 University Center performance evaluations.

(a) EDA will evaluate the performance of each University Center. EDA will:

(1) Evaluate each University Center at least once every three years;

(2) Assess the University Center's contribution to providing technical assistance, conducting applied research, and disseminating project results, in accordance with the scope(s) of work

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funded during the evaluation period; and

(3) For peer review, ensure the participation of at least one other University Center, as appropriate, in the evaluation on a cost-reimbursement basis.

(b) A purpose of the evaluation is to determine if the University Center should continue to receive funding under the program.

[64 FR 5486, Feb. 3, 1999, as amended at 64 FR 69881, Dec. 14, 1999]

§ 318.2 Economic Development District performance evaluations.

EDA will evaluate the performance of each Economic Development District. EDA will:

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(a) Evaluate each Economic Development District at least once every three years;

(b) Assess the Economic Development District's management standards, financial accountability, and program performance; and

(c) For peer review, ensure the participation of at least one other Economic Development District organization, as appropriate, in the evaluation on a cost-reimbursement basis.

[64 FR 5486, Feb. 3, 1999, as amended at 64 FR 69881, Dec. 14, 1999]

CHAPTER IV—EMERGENCY STEEL GUARANTEE LOAN BOARD

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PART 400—EMERGENCY STEEL GUARANTEE LOAN PROGRAM

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AUTHORITY: Pub. L. 106-51, 113 Stat. 252 (15
U.S.C. 1841 note).

SOURCE: 64 FR 57933, Oct. 27, 1999, unless
otherwise noted.

Subpart A—General

§ 400.1 Purpose.

This part is issued by the Emergency Steel Guarantee Loan Board pursuant to section 552 of title 5 of the United States Code and the Emergency Steel Loan Guarantee Act of 1999, Chapter 1 of Public Law 106-51. This part contains rules for making and servicing loans to qualified steel and iron ore companies guaranteed by the Board.

§ 400.2 Definitions.

(a) *Act* means the Emergency Steel Loan Guarantee Act of 1999, Chapter 1 of Public Law 106-51.

(b) *Administer, administering and administration*, mean the Lender's actions in making, disbursing, servicing (including, but not limited to care, preservation and maintenance of collateral), collecting and liquidating a loan and security.

(c) *Applicant* means the private banking or investment institution applying for a loan guarantee under this part.

(d) *Board* means the Emergency Steel Guarantee Loan Board.

(e) *Borrower* means a Qualified Steel Company which could receive a loan guaranteed by the Board under this Program.

(f) *Guarantee* means the written agreement between the Board and the Lender, and approved by the Borrower, pursuant to which the Board guarantees repayment of a specified percentage of the principal of the loan, including the Special Terms and Conditions, the General Terms and Conditions, and all exhibits thereto.

(g) *Lender* means a private banking or investment institution that is eligible pursuant to § 400.201.

(h) *Loan Documents* mean the loan agreement and all other instruments, and all documentation between the Lender and the Borrower evidencing the making, disbursing, securing, collecting, or otherwise administering of the loan.

(i) *Program* means the Emergency Steel Guarantee Loan Program established by the Act.

(j) *Security* means all property, real or personal, required by the provisions of the Guarantee or by the Loan Documents to secure repayment of any indebtedness of the Borrower under the Loan Documents or Guarantee.

(k) *Qualified Steel Company* means a company that is incorporated under the laws of any State; is engaged in the production and manufacture of a product defined by the American Iron and Steel Institute as a basic steel mill product, including ingots, slab and billets, plates, flat-rolled steel, sections and structural products, bars, rail type products, pipe and tube, and wire rod; and has experienced layoffs, production losses, or financial losses since January 1, 1998. An iron ore company incorporated under the law of any state is

considered a Qualified Steel Company for purposes of the Program.

Subpart B—Board Procedures

§ 400.100 Purpose and scope.

This subpart describes the Board's authorities and organizational structure, the means and rules by which the Board takes actions, and procedures for public access to Board records.

§ 400.101 Composition of the Board.

The Board consists of the Chairman of the Board of Governors of the Federal Reserve System, who acts as Chairman of the Board, the Chairman of the Securities and Exchange Commission, and the Secretary of Commerce.

§ 400.102 Authority of the Board.

Pursuant to the provisions of the Act, the Board is authorized to guarantee loans provided to Qualified Steel Companies by private banking and investment institutions in accordance with the procedures, rules, and regulations established by the Board, to make the determinations authorized by the Act, and to take such other actions as necessary to carry out its functions in accordance with the Act.

§ 400.103 Offices.

The principal offices of the Board are in the U.S. Department of Commerce, Washington, DC 20230.

§ 400.104 Meetings and actions of the Board.

(a) *Place and frequency.* The Board meets, on the call of the Chairman, in order to consider matters requiring action by the Board. Time and place for any such meeting shall be determined by the members of the Board.

(b) *Quorum and voting.* Two voting members of the Board constitute a quorum for the transaction of business. All decisions and determinations of the Board shall be made by a majority vote of the voting members. All votes on determinations of the Board required by the Act shall be recorded in the minutes. A Board member may request that any vote be recorded according to individual Board members.

(c) *Agenda of meetings.* To the extent practicable, an agenda for each meeting shall be distributed to members of the Board at least two days in advance of the date of the meeting, together with copies of materials relevant to the agenda items.

(d) *Minutes.* The Secretary of the Board shall keep minutes of each Board meeting and of action taken without a meeting, a draft of which is to be distributed to each member of the Board as soon as practicable after each meeting or action. To the extent practicable, the minutes of a Board meeting shall be corrected and approved at the next meeting of the Board.

(e) *Use of conference call communications equipment.* Any member may participate in a meeting of the Board through the use of conference call, telephone or similar communications equipment, by means of which all persons participating in the meeting can simultaneously speak to and hear each other. Any member so participating in a meeting shall be deemed present for all purposes. Actions taken by the Board at meetings conducted through the use of such equipment, including the votes of each member, shall be recorded in the usual manner in the minutes of the meetings of the Board.

(f) *Actions between meetings.* When, in the judgment of the Chairman, circumstances occur making it desirable for the Board to consider action when it is not feasible to call a meeting, the relevant information and recommendations for action may be transmitted to the members by the Secretary of the Board and the voting members may communicate their votes to the Chairman in writing (including an action signed in counterpart by each Board member), electronically, or orally (including telephone communication). Any action taken under this paragraph has the same effect as an action taken at a meeting. Any such action shall be recorded in the minutes.

(g) *Delegations of authority.* The Board may delegate authority, subject to such terms and conditions as the Board deems appropriate, to the Executive Director, the General Counsel, or the Secretary of the Board, to take certain actions not required by the Act to be taken by the Board. All delegations

shall be made pursuant to resolutions of the Board and recorded in writing, whether in the minutes of a meeting or otherwise. Any action taken pursuant to delegated authority has the effect of an action taken by the Board.

§ 400.105 Staff.

(a) *Executive Director.* The Executive Director of the Board advises and assists the Board in carrying out its responsibilities under the Act, provides general direction with respect to the administration of the Board's actions, directs the activities of the staff, and performs such other duties as the Board may require.

(b) *General Counsel.* The General Counsel of the Board provides legal advice relating to the responsibilities of the Board and performs such other duties as the Board may require.

(c) *Secretary of the Board.* The Secretary of the Board sends notice of all meetings, prepares minutes of all meetings, maintains a complete record of all votes and actions taken by the Board, has custody of all records of the Board and performs such other duties as the Board may require.

§ 400.106 Ex parte communications.

Oral or written communication, not on the public record, between the Board, or any member of the Board, and any party or parties interested in any matter pending before the Board concerning the substance of that matter is prohibited. This section also applies to the Board's staff and employees of the constituent agencies who are or reasonably may be expected to be involved in the decisional process of the matter pending before the Board.

§ 400.107 Freedom of Information Act.

(a) *Definitions.* All terms used in this section which are defined in 5 U.S.C. 551 or 5 U.S.C. 552 shall have the same meaning in this section. In addition the following definitions apply to this section:

(1) *FOIA*, as used in this section, means the "Freedom of Information Act," as amended, 5 U.S.C. 552.

(2) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or

profit interests of the requester or the person on whose behalf the request is made.

(3) *Direct costs* mean those expenditures that the Board actually incurs in searching for, reviewing, and duplicating documents in response to a request made under paragraph (c) of this section. Direct costs include, for example, the labor costs of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits). Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(4) *Duplication* means the process of making a copy of a document in response to a request for disclosure of records or for inspection of original records that contain exempt material or that otherwise cannot be inspected directly. Among others, such copies may take the form of paper, microfilm, audiovisual materials, or machine-readable documentation (e.g., magnetic tape or disk).

(5) *Educational institution* means a preschool, a public or private elementary or secondary school, or an institution of undergraduate higher education, graduate higher education, professional education, or an institution of vocational education that operates a program of scholarly research.

(6) *Noncommercial scientific institution* refers to an institution that is not operated on a "commercial" basis (as that term is used in this section) and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(7) *News* means information about current events or that would be of current interest to the public. Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large, and publishers of newspapers and other periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. "Freelance" journalists may be regarded as working for a news organization if they

can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.

(8) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the general public.

(9) *Review* means the process of examining documents, located in response to a request for access, to determine whether any portion of a document is exempt information. It includes doing all that is necessary to excise the documents and otherwise to prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(10) *Search* means the process of looking for material that is responsive to a request, including page-by-page or line-by-line identification within documents. Searches may be done manually or by computer.

(b) *Records available for public inspection and copying.*—(1) *Types of records made available.* The information in this section is furnished for the guidance of the public and in compliance with the requirements of the Freedom of Information FOIA, as amended (5 U.S.C. 552)(FOIA). This section sets forth the procedures the Board follows to make publicly available the materials specified in 5 U.S.C. 552(a)(2). These materials shall be made available for inspection and copying at the Board's Freedom of Information Office pursuant to 5 U.S.C. 552(a)(2). Information routinely provided to the public as part of a regular Board activity (for example, press releases) may be provided to the public without following this section.

(2) *Reading room procedures.* Information available under this section is available for inspection and copying, from 9:00 a.m. to 5:00 p.m. weekdays, at the Freedom of Information Office of the Board, Steel Guarantee Loan Board, U.S. Department of Commerce, Washington, DC 20230.

(3) *Electronic records.* Information available under this section that was created on or after November 1, 1996, shall also be available on the Board's website, found at www.doc.gov

(c) *Records available to the public on request.*—(1) *Types of records made available.* All records of the Board that are not available under paragraph (b) of this section shall be made available upon request, pursuant to the procedures in this section and the exceptions set forth in the FOIA. The Board's policy is to make discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

(2) *Procedures for requesting records.* A request for records shall reasonably describe the records in a way that enables the Board's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the Board's operations. The request shall be submitted in writing to the Secretary of the Board, Steel Guarantee Loan Board, U.S. Department of Commerce, Washington, DC 20230; or sent by facsimile to the Secretary of the Board. The request shall be clearly marked *FREEDOM OF INFORMATION ACT REQUEST*.

(3) *Contents of request.* The request shall contain the following information:

(i) The name and address of the requester, and the telephone number at which the requester can be reached during normal business hours;

(ii) Whether the requested information is intended for commercial use, or whether the requester represents an educational or noncommercial scientific institution, or news media;

(iii) A statement agreeing to pay the applicable fees, or a statement identifying any fee limitation desired, or a request for a waiver or reduction of fees that satisfies paragraph (f) of this section.

(d) *Processing requests.*—(1) *Priority of responses.* The date of receipt for any request, including one that is addressed incorrectly or that is referred to the Board by another agency, is the date the Secretary of the Board actually receives the request. The Secretary of the Board shall normally process requests in the order they are received. However, in the Secretary of the

Board's discretion, the Board may use two or more processing tracks by distinguishing between simple and more complex requests based on the number of pages involved, or some other measure of the amount of work and/or time needed to process the request, and whether the request qualifies for expedited processing as described in paragraph (d)(2), of this section. When using multitrack processing, the Secretary of the Board may provide requesters in the slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing. The Secretary of the Board shall contact the requester by telephone or by letter, whichever is most efficient in each case.

(2) *Expedited processing.* (i) A person may request expedited access to records by submitting a statement, certified to be true and correct to the best of that person's knowledge and belief, that demonstrates a compelling need for the records, as defined in 5 U.S.C. 552(a)(6)(E)(v).

(ii) The Secretary of the Board shall notify a requester of the determination whether to grant or deny a request for expedited processing within ten working days of receipt of the request. If the Secretary of the Board grants the request for expedited processing, the Board shall process the request for access to information as soon as practicable. If the Secretary of the Board denies a request for expedited processing, the requester may file an appeal pursuant to the procedures set forth in paragraph (e) of this section, and the Board shall respond to the appeal within twenty days after the appeal was received by the Board.

(3) *Time limits.* The time for response to requests shall be 20 working days, except:

(i) In the case of expedited treatment under paragraph (d)(2) of this section;

(ii) Where the running of such time is suspended for payment of fees pursuant to paragraph (f)(2)(i) of this section;

(iii) Where the estimated charge is less than \$250, and the requester does not guarantee payment pursuant to paragraph (f)(2)(i) of this section; or

(iv) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B)(iii), the time limit may be extended for a pe-

riod of time not to exceed 10 working days as provided by written notice to the requester, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; or such alternative time period as mutually agreed to by the Secretary of the Board and the requester when the Secretary of the Board notifies the requester that the request cannot be processed in the specified time limit.

(4) *Response to request.* In response to a request that satisfies paragraph (c) of this section, an appropriate search shall be conducted of records in the custody and control of the Board on the date of receipt of the request, and a review made of any responsive information located. The Secretary of the Board shall notify the requester of:

(i) The Secretary of the Board's determination of the request and the reasons therefor;

(ii) The information withheld, and the basis for withholding; and

(iii) The right to appeal any denial or partial denial, pursuant to paragraph (e) of this section.

(5) *Referral to another agency.* To the extent a request covers documents that were created by, obtained from, classified by, or is in the primary interest of another agency, the Secretary of the Board may refer the request to that agency for a direct response by that agency and inform the requester promptly of the referral. The Secretary of the Board shall consult with another Federal agency before responding to a requester if the Board receives a request for a record in which:

(i) Another Federal agency subject to the FOIA has a significant interest, but not the primary interest; or

(ii) Another Federal agency not subject to the FOIA has the primary interest or a significant interest. Ordinarily, the agency that originated a record will be presumed to have the primary interest in it.

(6) *Providing responsive records.* (i) A copy of records or portions of records responsive to the request shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the requester elects to take delivery of the documents at the Board's Freedom of Information Office or

makes other acceptable arrangements, or the Secretary of the Board deems it appropriate to send the documents by another means. The Secretary of the Board shall provide a copy of the record in any form or format requested if the record is readily reproducible in that form or format, but the Secretary of the Board need not provide more than one copy of any record to a requester.

(ii) The Secretary of the Board shall provide any reasonably segregable portion of a record that is responsive to the request after deleting those portions that are exempt under the FOIA or this section.

(iii) Except where disclosure is expressly prohibited by statute, regulation, or order, the Secretary of the Board may authorize the release of records that are exempt from mandatory disclosure whenever the Board or designated Board members determine that there would be no foreseeable harm in such disclosure.

(iv) The Board is not required in response to the request to create records or otherwise to prepare new records.

(7) *Prohibition against disclosure.* Except as provided in this part, no officer, employee, or agent of the Board shall disclose or permit the disclosure of any unpublished information of the Board to any person (other than Board officers, employees, or agents properly entitled to such information for the performance of official duties), unless required by law.

(e) *Appeals.* (1) Any person denied access to Board records requested under paragraph (c) of this section, denied expedited processing under paragraph (d) of this section, or denied a waiver of fees under paragraph (f) of this section may file a written appeal within 30 calendar days after the date of such denial with the Board. The written appeal shall prominently display the phrase *FREEDOM OF INFORMATION ACT APPEAL* on the first page, and shall be addressed to the General Counsel of the Board, Steel Guarantee Loan Board, U.S. Department of Commerce, Washington, DC 20230; or sent by facsimile to the General Counsel of the Board. The appeal shall include a copy of the original request, the initial denial, if any, and a statement of the reasons

why the requested records should be made available and why the initial denial was in error.

(2) The General Counsel of the Board shall make a determination regarding any appeal within 20 working days of actual receipt of the appeal, and the determination letter shall notify the appealing party of the right to seek judicial review in event of denial.

(f) *Fee schedules; waiver of fees.*—

(1) *Fee schedule.* The fees applicable to a request for records pursuant to paragraph (c) of this section are set forth in the uniform fee schedule at the end of this paragraph (f).

(i) *Search.* (A) Search fees shall be charged for all requests—other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media—subject to the limitations of paragraph (f)(1)(iv) of this section. The Secretary of the Board shall charge for time spent searching even if no responsive record is located or if the Secretary of the Board withholds the record(s) located as entirely exempt from disclosure.

Search fees shall be the direct costs of conducting the search by the involved employees.

(B) For computer searches of records, requesters will be charged the direct costs of conducting the search, although certain requesters (as provided in paragraph (f)(3) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (f)(3)) are entitled to the cost equivalent of two hours of manual search time without charge. These direct costs include the costs, attributable to the search, of operating a central processing unit and operator/programmer salary.

(ii) *Duplication.* Duplication fees will be charged to all requesters, subject to the limitations of paragraph (f)(1)(iv) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee shall be 15 cents per page. For copies produced by computer, such as tapes or printouts, the Secretary of the Board shall charge the direct costs, including operator time, of producing the copy. For other forms of duplication, the

Secretary of the Board will charge the direct costs of that duplication.

(iii) *Review.* Review fees shall be charged to requesters who make a commercial use request. Review fees shall be charged only for the initial record review—the review done when the Secretary of the Board determines whether an exemption applies to a particular record at the initial request level. No charge will be made for review at the administrative appeal level for an exemption already applied. However, records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies, and the costs of that review are chargeable. Review fees shall be the direct costs of conducting the review by the involved employees.

(iv) *Limitations on charging fees.* (A) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

(B) No search fee or review fee will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(C) Whenever a total fee calculated under this paragraph is \$25 or less for any request, no fee will be charged.

(D) For requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than \$25.

(2) *Payment procedures.* All persons requesting records pursuant to paragraph (c) of this section shall pay the applicable fees before the Secretary of the Board sends copies of the requested records, unless a fee waiver has been granted pursuant to paragraph (f)(6) of this section. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(i) *Advance notification of fees.* If the estimated charges are likely to exceed \$25, the Secretary of the Board shall notify the requester of the estimated amount, unless the requester has indicated a willingness to pay fees as high as those anticipated. Upon receipt of such notice, the requester may confer with the Secretary of the Board to re-

formulate the request to lower the costs. The processing of the request shall be suspended until the requester provides the Secretary of the Board with a written guarantee that payment will be made upon completion of the processing.

(ii) *Advance payment.* The Secretary of the Board shall require advance payment of any fee estimated to exceed \$250. The Secretary of the Board shall also require full payment in advance where a requester has previously failed to pay a fee in a timely fashion. If an advance payment of an estimated fee exceeds the actual total fee by \$1 or more, the difference shall be refunded to the requester. The time period for responding to requests under paragraph (d)(4) of this section, and the processing of the request shall be suspended until the Secretary of the Board receives the required payment.

(iii) *Late charges.* The Secretary of the Board may assess interest charges when fee payment is not made within 30 days of the date on which the billing was sent. Assessment of such interest will commence on the 31st day following the day on which the billing was sent. Interest is at the rate prescribed in 31 U.S.C. 3717.

(3) *Categories of uses.* The fees assessed depend upon the fee category. In determining which category is appropriate, the Secretary of the Board shall look to the identity of the requester and the intended use set forth in the request for records. Where a requester's description of the use is insufficient to make a determination, the Secretary of the Board may seek additional clarification before categorizing the request.

(i) *Commercial use requester.* The fees for search, duplication, and review apply when records are requested for commercial use.

(ii) *Educational, non-commercial scientific institutions, or representatives of the news media requesters.* The fees for duplication apply when records are not sought for commercial use, and the requester is a representative of the news media or an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research. The first 100 pages of duplication, however, will be provided free.

(iii) *All other requesters.* For all other requests, the fees for search and duplication apply. The first two hours of search time and the first 100 pages of duplication, however, will be provided free.

(4) *Nonproductive search.* Fees for search may be charged even if no responsive documents are found. Fees for search and review may be charged even if the request is denied.

(5) *Aggregated requests.* A requester may not file multiple requests at the same time, solely in order to avoid payment of fees. If the Secretary of the Board reasonably believes that a requester is separating a request into a series of requests for the purpose of evading the assessment of fees or that several requesters appear to be acting together to submit multiple requests solely in order to avoid payment of fees, the Secretary of the Board may aggregate such requests and charge accordingly. It is considered reasonable for the Secretary of the Board to presume that multiple requests by one requester on the same topic made within a 30-day period have been made to avoid fees.

(6) *Waiver or reduction of fees.* A request for a waiver or reduction of the fees, and the justification for the waiver, shall be included with the request for records to which it pertains. If a waiver is requested and the requester has not indicated in writing an agreement to pay the applicable fees if the waiver request is denied, the time for response to the request for documents, as set forth in under paragraph (d)(4) of this section, shall not begin until a determination has been made on the request for a waiver or reduction of fees.

(i) *Standards for determining waiver or reduction.* The Secretary of the Board may grant a waiver or reduction of fees where it is determined both that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government, and that the disclosure of information is not primarily in the commercial interest of the requester. In making this determination, the following factors shall be considered:

(A) Whether the subject of the records concerns the operations or activities of the government;

(B) Whether disclosure of the information is likely to contribute significantly to public understanding of government operations or activities;

(C) Whether the requester has the intention and ability to disseminate the information to the public;

(D) Whether the information is already in the public domain;

(E) Whether the requester has a commercial interest that would be furthered by the disclosure; and, if so,

(F) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(ii) *Contents of request for waiver.* A request for a waiver or reduction of fees shall include a clear statement of how the request satisfies the criteria set forth in paragraph (f)(6)(i) of this section.

(iii) *Burden of proof.* The burden shall be on the requester to present evidence or information in support of a request for a waiver or reduction of fees.

(iv) *Determination by Secretary of the Board.* The Secretary of the Board shall make a determination on the request for a waiver or reduction of fees and shall notify the requester accordingly. A denial may be appealed to the Board in accordance with paragraph (e) of this section.

(7) *Uniform fee schedule.*

| Service | Rate |
|--|---|
| (i) Manual search | Actual salary rate of employee involved, plus 16 percent of salary rate. |
| (ii) Computerized search | Actual direct cost, including operator time. |
| (iii) Duplication of records: | |
| (A) Paper copy reproduction. | \$.15 per page |
| (B) Other reproduction (e.g., computer disk or printout, microfilm, microfiche, or microform). | Actual direct cost, including operator time. |
| (iv) Review of records (includes preparation for release, i.e. excising). | Actual salary rate of employee conducting review, plus 16 percent of salary rate. |

(g) *Request for confidential treatment of business information.*—(1) *Submission of*

request. Any submitter of information to the Board who desires confidential treatment of business information pursuant to 5 U.S.C. 552(b)(4) shall file a request for confidential treatment with the Board at the time the information is submitted or a reasonable time after submission.

(2) *Form of request.* Each request for confidential treatment of business information shall state in reasonable detail the facts supporting the commercial or financial nature of the business information and the legal justification under which the business information should be protected. Conclusory statements that release of the information would cause competitive harm generally will not be considered sufficient to justify confidential treatment.

(3) *Designation and separation of confidential material.* All information considered confidential by a submitter shall be clearly designated "*PROPRIETARY*" or "*BUSINESS CONFIDENTIAL*" in the submission and separated from information for which confidential treatment is not requested. Failure to segregate confidential commercial or financial information from other material may result in release of the nonsegregated material to the public without notice to the submitter.

(h) *Request for access to confidential commercial or financial information.*—(1) *Request for confidential commercial or financial information.* A request by a submitter for confidential treatment of any business information shall be considered in connection with a request for access to that information.

(2) *Notice to the submitter.* (i) The Secretary of the Board shall notify a submitter who requested confidential treatment of information pursuant to 5 U.S.C. 552(b)(4), of the request for access.

(ii) Absent a request for confidential treatment, the Secretary of the Board may notify a submitter of a request for access to submitter's business information if the Secretary of the Board reasonably believes that disclosure of the information may cause substantial competitive harm to the submitter.

(iii) The notice given to the submitter by mail, return receipt requested, shall be given as soon as practicable after receipt of the request for

access, and shall describe the request and provide the submitter seven working days from the date of notice, to submit written objections to disclosure of the information. Such statement shall specify all grounds for withholding any of the information and shall demonstrate why the information which is considered to be commercial or financial information, and that the information is a trade secret, is privileged or confidential, or that its disclosure is likely to cause substantial competitive harm to the submitter. If the submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to the release of the information. Information a submitter provides under this paragraph may itself be subject to disclosure under the FOIA.

(3) *Exceptions to notice to submitter.* Notice to the submitter need not be given if:

(i) The Secretary of the Board determines that the request for access should be denied;

(ii) The requested information lawfully has been made available to the public;

(iii) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(iv) The submitter's claim of confidentiality under 5 U.S.C. 552(b)(4) appears obviously frivolous or has already been denied by the Secretary of the Board, except that in this last instance the Secretary of the Board shall give the submitter written notice of the determination to disclose the information at least seven working days prior to disclosure.

(4) *Notice to requester.* At the same time the Secretary of the Board notifies the submitter, the Secretary of the Board also shall notify the requester that the request is subject to the provisions of this section.

(5) *Determination by Secretary of the Board.* The Secretary of the Board's determination whether or not to disclose any information for which confidential treatment has been requested pursuant to this section shall be communicated to the submitter and the requester immediately. If the Secretary of the Board determines to disclose the business information over the objection of

a submitter, the Secretary of the Board shall give the submitter written notice via mail, return receipt requested, or similar means, which shall include:

(i) A statement of reason(s) why the submitter's objections to disclosure were not sustained;

(ii) A description of the business information to be disclosed; and

(iii) A statement that the component intends to disclose the information seven working days from the date the submitter receives the notice.

(6) *Notice of lawsuit.* The Secretary of the Board shall promptly notify any submitter of information covered by this section of the filing of any suit against the Board to compel disclosure of such information, and shall promptly notify a requester of any suit filed against the Board to enjoin the disclosure of requested documents.

§ 400.108 Restrictions on lobbying.

(a) No funds received through a loan guaranteed under this Program may be expended by the recipient of a Federal contract, grant, loan, loan Guarantee, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan or loan Guarantee, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, loan Guarantee, or cooperative agreement.

(b) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in the application form, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or Guarantee.

(c) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a Standard Form-LLL if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or Guarantee.

(d) Each person shall file a certification, contained in the application form, and a disclosure form (Standard Form-LLL), if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

(e) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or Guarantee a loan exceeding \$150,000, unless such person previously filed a certification, and a disclosure form, if required, under paragraph (c) of this section.

(f) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (d) or (e) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

§ 400.109 Government-wide debarment and suspension (nonprocurement).

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a government-wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and non-financial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect. The Board shall review the List of Debarred entities prior to making final loan Guarantee decisions. Suspension or debarment may be a basis for denying a loan Guarantee.

(b) This section applies to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of this section such transactions will be referred to as "covered transactions".

(1) *Covered transaction.* For purposes of this section, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (b)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan Guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction;

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently \$100,000) under a primary covered transaction;

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons may include loan officers or chief executive officers acting as principal investigators and providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of this section would be prohibited by law.

(3) *Board covered transactions.* This section applies to the Board's loan Guarantees, subcontracts and transactions at any tier that are charges as direct or indirect costs, regardless of type.

(c) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended

shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to paragraph (l) of this section.

(d) *Lower tier covered transactions.* Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see paragraph (b)(1)(ii) of this section for the period of their exclusion).

(e) *Exceptions.* Debarment or suspension does not affect a person's eligibility for—

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of this section would be prohibited by law.

(f) Persons who are ineligible are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

(g) Persons who accept voluntary exclusions are excluded in accordance with the terms of their settlements. The Board shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

(h) The Board may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with the Executive Order.

(i) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(j) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible or voluntarily excluded, except as provided in paragraph (h) of this section.

(k) Except as permitted under paragraphs (h) or (i) of this section, a participant shall not knowingly do business under a covered transaction with a person who is—

(1) Debarred or suspended;

(2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or

(3) Ineligible for or voluntarily excluded from the covered transaction.

(l) Violation of the restriction under paragraph (k) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(m) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

§ 400.110 Amendments.

The Board's rules in this chapter may be adopted or amended, or new rules may be adopted, only by majority vote of the Board. Authority to adopt or amend these rules may not be delegated.

Subpart C—Steel Guarantee Loans

§ 400.200 Eligible Borrower.

(a) An eligible Borrower must be a Qualified Steel Company that can demonstrate:

(1) Credit is not otherwise available to it under reasonable terms or conditions sufficient to meet its financing needs, as reflected in the financial and business plans of the company;

(2) The prospective earning power of that company, together with the character and value of the security pledged, furnish reasonable assurance of repayment of the loan to be guaranteed in accordance with its terms;

(3) The company has agreed to permit audits by the General Accounting Office and an independent auditor acceptable to the Board prior to the issuance of the guarantee and while any such guaranteed loan is outstanding;

(4) It has experienced layoffs, production losses, or financial losses between January 1, 1998, and the date of application for the Guarantee, demonstrated as a comparison between employment, production, or net income

existing on January 1, 1998 and on the date of application; and

(5) In the case of a purchaser of substantial assets of a Qualified Steel Company; the Qualified Steel Company is unable to re-organize itself.

(b) For purposes of this section, a company will be considered a purchaser of substantial assets of a Qualified Steel Company if the company's identifiable assets purchased from a Qualified Steel Company are 50 percent or more of the consolidated assets of that Qualified Steel Company and its subsidiaries.

(c) The Lender must provide with its application a letter from at least one lending institution other than the Lender to which the Borrower has applied for financial assistance, since January 1, 1998, indicating that the Borrower was denied for substantially the same loan they are now applying for, and the reasons the Borrower was unable to obtain the financing for which it applied. In addition, the Lender applying for a guarantee under this Program must certify that it would not make the loan without the Board's guarantee.

§ 400.201 Eligible Lender.

(a) A lender eligible to apply to the Board for a Guarantee of a loan must be:

(1) A banking institution, such as a commercial bank or trust company, subject to regulation by the Federal banking agencies enumerated in 12 U.S.C. 1813; or

(2) An investment institution, such as an investment bank, commercial finance company, or insurance company that is currently engaged in commercial lending in the normal course of its business.

(b) Status as a Lender under paragraph (a) of this section does not assure that the Board will issue the Guarantee sought, or otherwise preclude the Board from declining to issue a Guarantee. In addition to evaluating an application pursuant to § 400.207, in making a determination to issue a Guarantee to a Lender, the Board will assess:

§ 400.202

(1) The Lender's level of regulatory capital, in the case of banking institutions, or net worth, in the case of investment institutions;

(2) Whether the Lender possesses the ability to administer the loan, as required by § 400.211(b), including its experience with loans to steel companies;

(3) The scope, volume and duration of the Lender's activity in administering loans;

(4) The performance of the Lender's loan portfolio, including its current delinquency rate;

(5) The Lender's loss rate as a percentage of loan amounts for its current fiscal year; and

(6) Any other matter the Board deems material to its assessment of the Lender.

(c) In the case of the refinancing of an existing credit, the applicant must be a different lender than the holder of the existing credit.

§ 400.202 Loan amount.

(a) The aggregate amount of loan principal guaranteed under this Program to a single Qualified Steel Company may not exceed \$ 250 million.

(b) Of the aggregate amount of loans authorized to be guaranteed and outstanding at any one time, not more than \$30 million shall be loans to iron ore companies.

§ 400.203 Guarantee percentage.

A guarantee issued by the Board may not exceed 85 percent of the amount of the principal of a loan to a Qualified Steel Company.

§ 400.204 Loan terms.

(a) All loans guaranteed under the Program shall be due and payable in full no later than December 31, 2005.

(b) Loans guaranteed under the Program must bear a rate of interest determined by the Board to be reasonable. The reasonableness of an interest rate will be determined with respect to current average yields on outstanding obligations of the United States with remaining periods of maturity comparable to the term of the loan sought to be guaranteed. The Board may reject an application to guarantee a loan if it determines the interest rate of such loan to be unreasonable.

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(c)(1) The performance of all of the Borrower's obligations under the Loan Documents shall be secured by, and shall have the priority in, such Security as provided for within the terms and conditions of the Guarantee.

(2) Without limiting the Lender's or Borrower's obligations under paragraph (c) of this section, at a minimum, the loan shall be secured by:

(i) A fully perfected and enforceable security interest and/or lien, with first priority over conflicting security interests or other liens in all property acquired, improved, refinanced, or derived from the loan funds;

(ii) A fully perfected and enforceable security interest and/or lien in any other property of the Borrower's pledged to secure the loan, including accessions, replacements, proceeds, or property given by a third party as Security for the loan, the priority of which shall be, at a minimum, equal in status with the existing highest voluntarily granted or acquired interest or lien;

(3) The entire loan will be secured by the same Security with equal lien priority for the guaranteed and the unguaranteed portions of the loan. The unguaranteed portion of the loan will neither be paid first nor given any preference over the guaranteed portion.

(4) An Applicant's compliance with paragraph (c)(2) of this section does not assure a finding of reasonable assurance of repayment, or assure the Board's Guarantee of the loan.

(d) An eligible Lender may assess and collect from the Borrower such other fees and costs associated with the application and origination of the loan as are reasonable and customary, taking into consideration the amount and complexity of the credit. The Board may take such other fees and costs into consideration when determining whether to offer a Guarantee to the Lender.

[64 FR 57933, Oct. 27, 1999, as amended at 64 FR 72020, Dec. 23, 1999]

§ 400.205 Application process.

(a) *Application process.* An original application and three copies must be received by the Board no later than 8 p.m. EST, January 31, 2000, in the U.S. Department of Commerce, Washington,

DC 20230. Applications which have been provided to a delivery service on or before January 30, 2000, with "delivery guaranteed" before 8 p.m. on January 30, 2000, will be accepted for review if the Applicant can document that the application was provided to the delivery service with delivery to the address listed in this section guaranteed prior to the closing date and time. A postmark of January 30, 2000, is not sufficient to meet this deadline as the application must be received by the required date and time. Applications will not be accepted via facsimile machine transmission or electronic mail.

(b) Applications shall contain the following:

(1) A completed Form "Application for Steel Guarantee Loan";

(2) The information required for the completion of Form "Environmental Assessment and Compliance Findings for Related Environmental Laws" and attachments, as required by § 400.206(a)(2)(i)(D), unless the project is categorically excluded under § 400.206(b);

(3) All Loan Documents that will be signed by the Lender and the Borrower, if the application is approved, including all terms and conditions of, and Security or additional Security to assure the Borrower's performance under, the loan;

(4) Certification by the chairman of the board and the chief executive officer of the Borrower acknowledging that the Borrower is aware that the Lender is applying to the Board for a Guarantee of a loan under the Program, as described in the Loan Documents; and agreeing to permit audits by the General Accounting Office, its designee, and an independent auditor acceptable to the Board prior to the issuance of the Guarantee and annually thereafter while such guarantee is outstanding;

(5) The Lender's full written underwriting analysis of the loan to be guaranteed by the Board;

(6) A certification that the Lender has followed the same loan underwriting analysis with the loan to be guaranteed as it would follow for a loan not guaranteed by the Government; and a certification by the Lender, that the loan, Lender, and Borrower

meet each of the requirements of the Program as set forth in the Act and the Board's rules in this part;

(7) A description of all Security for the loan, including, as applicable, current appraisal of real and personal property, copies of any appropriate environmental site assessments, and current personal and corporate financial statements of any guarantors for the same period as required for the Borrower. Appraisals of real property shall be prepared by State licensed or certified appraisers, and be consistent with the "Uniform Standards of Professional Appraisal Practice," promulgated by the Appraisal Standards Board of the Appraisal Foundation. Financial statements of guarantors shall be prepared by independent Certified Public Accountants;

(8) Consolidated financial statements of the Borrower for the previous three years that have been audited by an independent certified public accountant, including any associated notes, as well as any interim financial statements and associated notes for the current fiscal year;

(9) A five year history and five year projection for revenue, cash flow, average realized prices and average realized production costs. If the loan funds are to be used to purchase substantial assets of an existing firm, a pro forma balance sheet at startup, and five years projected year end balance sheets and income statement at start-up;

(10) Documentation that credit is not otherwise available to the borrower under reasonable terms or conditions sufficient to meet its financial needs, as reflected in the financial or business plan of that company. The Lender must provide with its application those items required by § 400.200(c); and

(11) Documentation sufficient to demonstrate that the Lender is eligible under § 400.201(a) and to allow the Board to make a determination to issue a Guarantee to such Lender as set forth in § 400.201(b).

(c) No Guarantee will be made if either the Borrower or Lender has an outstanding, delinquent Federal debt until:

(1) The delinquent account has been paid in full;

(2) A negotiated repayment schedule is established and at least one payment has been received; or

(3) Other arrangements, satisfactory to the agency responsible for collecting the debt, are made.

[64 FR 57933, Oct. 27, 1999, as amended at 64 FR 72021, Dec. 23, 1999]

§ 400.206 Environmental requirements.

(a)(1) *In general.* Environmental assessments of the Board's actions will be conducted in accordance with applicable statutes, regulations, and Executive Orders. Therefore, each application for a Guarantee under the Program must be accompanied by information necessary for the Board to meet the requirements of applicable law.

(2) *Actions requiring compliance with NEPA.* (i) The types of actions classified as "major Federal actions" subject to NEPA procedures are discussed generally in 40 CFR parts 1500 through 1508.

(ii) With respect to this Program, these actions typically include:

(A) Any project, permanent or temporary, that will involve construction and/or installations;

(B) Any project, permanent or temporary, that will involve ground disturbing activities; and

(C) Any project supporting renovation, other than interior remodeling.

(3) *Environmental information required from the Lender.*

(i) Environmental data or documentation concerning the use of the proceeds of any loan guaranteed under this Program must be provided by the Lender to the Board to assist the Board in meeting its legal responsibilities. The Lender may obtain this information from the Borrower. (ii) Such information includes:

(A) Documentation for an environmental threshold review from qualified data sources, such as a Federal, State or local agency with expertise and experience in environmental protection, or other sources, qualified to provide reliable environmental information;

(B) Any previously prepared environmental reports or data relevant to the loan at issue;

(C) Any environmental review prepared by Federal, State, or local agencies relevant to the loan at issue;

(D) The information required for the completion of Form XYZ, "Environmental Assessment and Compliance Findings for Related Environmental Laws;" and

(E) Any other information that can be used by the Board to ensure compliance with environmental laws.

(ii) All information supplied by the Lender is subject to verification by the Board.

(b) The regulations of the Council on Environmental Quality implementing NEPA require the Board to provide public notice of the availability of project specific environmental documents such as environmental impact statements, environmental assessments, findings of no significant impact, records of decision etc., to the affected public. See 40 CFR 1506.6(b). Environmental information concerning specific projects can be obtained from the Board by contacting: Executive Director, Emergency Steel Guarantee Loan Board, U.S. Department of Commerce, Washington, DC 20230.

(c) *National Environmental Policy Act.*

(1) *Purpose.* The purpose of this paragraph (c) is to adopt procedures for compliance with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, by the Board. This paragraph supplements regulations at 40 CFR Chapter V.

(2) *Definitions.* For purposes of this section, the following definitions apply: *Categorical exclusion* means a category of actions which do not individually or cumulatively have a significant effect on the human environment and for which neither an environmental assessment nor an environmental impact statement is required.

Environmental assessment means a document that briefly discusses the environmental consequences of a proposed action and alternatives prepared for the purposes set forth in 40 CFR 1508.9.

EIS means an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA.

FONSI means a finding of no significant impact on the quality of the human environment after the completion of an environmental assessment.

NEPA means the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*

Working capital loan means money used by an ongoing business concern to fund its existing operations.

(3) *Delegations to Executive Director.* (i) All incoming correspondence from Council on Environmental Quality (CEQ) and other agencies concerning matters related to NEPA, including draft and final EIS, shall be brought to the attention of the Executive Director. The Executive Director will prepare or, at his or her discretion, coordinate replies to such correspondence.

(ii) With respect to actions of the Board, the Executive Director will:

(A) Ensure preparation of all necessary environmental assessments and EISs;

(B) Maintain a list of actions for which environmental assessments are being prepared;

(C) Revise this list at regular intervals, and send the revisions to the Environmental Protection Agency;

(D) Make the list available for public inspection;

(E) Maintain a list of EISs; and

(F) Maintain a file of draft and final EISs.

(4) *Categorical exclusions.* (i) This paragraph describes various classes of Board actions that normally do not have a significant impact on the human environment and are categorically excluded. The word "normally" is stressed; there may be individual cases in which specific factors require contrary action.

(ii) Subject to the limitations in paragraph (c)(4)(iii) of this section, the actions described in this paragraph have been determined not to have a significant impact on the quality of the human environment. They are categorically excluded from the need to prepare an environmental assessment or an EIS under NEPA.

(A) Guarantees of working capital loans; and

(B) Guarantees of loans for the refinancing of outstanding indebtedness of the Borrower, regardless of the purpose for which the original indebtedness was incurred.

(iii) Actions listed in paragraph (c)(4)(ii) of this section that otherwise

are categorically excluded from NEPA review are not necessarily excluded from review if they would be located within, or in other cases, potentially affect:

(A) A floodplain;

(B) A wetland;

(C) Important farmlands, or prime forestlands or rangelands;

(D) A listed species or critical habitat for an endangered species;

(E) A property that is listed on or may be eligible for listing on the National Register of Historic Places;

(F) An area within an approved State Coastal Zone Management Program;

(G) A coastal barrier or a portion of a barrier within the Coastal Barrier Resources System;

(H) A river or portion of a river included in, or designated for, potential addition to the Wild and Scenic Rivers System;

(I) A sole source aquifer recharge area;

(J) A State water quality standard (including designated and/or existing beneficial uses and anti-degradation requirements); or

(K) The release or disposal of regulated substances above the levels set forth in a permit or license issued by an appropriate regulatory authority.

(5) *Responsibilities and procedures for preparation of an environmental assessment.* (i) the Executive Director will request that the Lender and Borrower provide information concerning all potentially significant environmental impacts of the Borrower's proposed project pursuant to 13 CFR 400.206. The Executive Director, consulting at his discretion with CEQ, will review the information provided by the Lender and Borrower. Though no specific format for an environmental assessment is prescribed, it shall be a separate document, suitable for public review and should include the following in conformance with 40 CFR 1508.9:

(A) *Description of the environment.* The existing environmental conditions relevant to the Board's analysis determining the environmental impacts of the proposed project, should be described. The no action alternative also should be discussed;

(B) *Documentation.* Citations to information used to describe the existing

environment and to assess environmental impacts should be clearly referenced and documented. These sources should include, as appropriate, but not be limited to, local, tribal, regional, State, and Federal agencies, as well as, public and private organizations and institutions;

(C) *Evaluating environmental consequences of proposed actions.* A brief discussion should be included of the need for the proposal, of alternatives as required by 42 U.S.C. 4332(2)(E) and their environmental impacts. The discussion of the environmental impacts should include measures to mitigate adverse impacts and any irreversible or irretrievable commitments of resources to the proposed project.

(ii) The Executive Director, in preparing an environmental assessment, may:

(A) Tier upon the information contained in a previous EIS, as described in 40 CFR 1502.20;

(B) Incorporate by reference reasonably available material, as described in 40 CFR 1502.21; and/or

(C) Adopt a previously completed EIS reasonably related to the project for which the proceeds of the loan sought to be guaranteed under the Program will be used, as describe in 40 CFR 1506.3.

(iii) Because of the statute's admonition to the Board to make its decisions as soon as possible after receiving applications, the Board will not:

(A) Publish notice of intent to prepare an environmental assessment, as describe in 40 CFR 1501.7;

(B) Conduct scoping, as described in 40 CFR 1501.7; and

(C) Seek comments on the environmental assessment, as described in 40 CFR 1503.1.

(iv) If, on the basis of an environmental assessment, it is determined that an EIS is not required, a FONSI, as described in 40 CFR 1508.13 will be prepared. The FONSI will include the environmental assessment or a summary of it and be available to the public from the Board. The Executive Director shall remain a record of these decisions, making them available to interested parties upon request. Requests should be directed to the Executive Director, Emergency Steel Guarantee

Loan Program, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Prior to a final loan guarantee decision, a copy of the NEPA documentation shall be sent to the Board for consideration.

(6) *Responsibilities and procedures for preparation of an environmental impact statement.* (i) If after an environmental assessment has been completed, it is determined that an EIS is necessary, it and other related documentation will be prepared by the Executive Director in accordance with section 102(2)(c) of NEPA, this section, and 40 CFR parts 1500 through 1508. The Executive Director may seek additional information from the applicant in preparing the EIS. Once the document is prepared, it shall be submitted to the Board. If the Board considers a document unsatisfactory, it shall be returned to the Executive Director for revision or supplementation prior to a loan guarantee decision; otherwise the Board will transmit the document to the Environmental Protection Agency.

(ii)(A) The following procedures, as discussed in 40 CFR parts 1500 through 1508, will be followed in preparing an EIS:

(1) The format and contents of the draft and final EIS shall be as discussed in 40 CFR 1502.

(2) The requirements of 40 CFR 1506.9 for filing of documents with the Environmental Protection Agency shall be followed.

(3) The Executive Director, consulting at his discretion with CEQ, shall examine carefully the basis on which supportive studies have been conducted to assure that such studies are objective and comprehensive in scope and in depth.

(4) NEPA requires that the decision making "utilize a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts." 42 U.S.C. 4332(A). If such disciplines are not present on the Board staff, appropriate use should be made of personnel of Federal, State, and local agencies, universities, non-profit organizations, or private industry.

(B) Until the Board issues a record of decision as provided in 40 CFR 1502.2 no

action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(3) 40 CFR 1506.10 places certain limitations on the timing of Board decisions on taking "major Federal actions." A loan guarantee shall not be made before the times set forth in 40 CFR 1506.10.

(iii) A public record of decision stating what the decision was; identifying alternatives that were considered, including the environmentally preferable one(s); discussing any national considerations that entered into the decision; and summarizing a monitoring and enforcement program if applicable for mitigating the environmental effects of a proposal; will be prepared. This record of decision will be prepared at the time the decision is made.

[64 FR 57933, Oct. 27, 1999, as amended at 64 FR 72021, Dec. 23, 1999]

§ 400.207 Application evaluation.

(a) *Eligibility screening.* Applications will be reviewed to determine whether the Lender and Borrower are eligible, the information required under § 400.205(b) is complete, and the proposed loan complies with applicable statutes and regulations. The Board can at any time reject an application that does not meet these requirements.

(b) *Evaluation criteria.* Applications that are determined to be eligible pursuant to paragraph (a) of this section shall be subject to a substantive review, on a competitive basis, by the Board based upon the following evaluation factors, in order of importance:

(1) The ability of the Borrower to repay the loan by the date specified in the Loan Document, which shall be no later than December 31, 2005;

(2) The adequacy of the proposed provisions to protect the Government, including sufficiency of Security, the priority of the lien position in the Security, and the percentage of Guarantee requested; and

(3) Adequacy of the underwriting analysis performed by the Lender in preparing the application and the ability of the Lender to administer the loan in full compliance with the req-

uisite standard of care set forth in § 400.211(b).

(c) *Decisions by the Board.* Upon completion of the evaluation of the application and as soon as possible after the due date, the Board will approve or deny all eligible applications timely received under this Program. The Board shall notify all Applicants in writing of the approval or denial of the Guarantee applications as soon as possible. Approvals for loan Guarantees shall be conditioned upon compliance with § 400.208.

§ 400.208 Issuance of the Guarantee.

(a) The Board's decisions to approve any application for, and extend an offer of, guarantee under § 400.207 is conditioned upon:

(1) The Lender and Borrower obtaining any required regulatory or judicial approvals;

(2) The Lender and Borrower being legally authorized to enter into the loan under the terms and conditions submitted to the Board in the application;

(3) The Board's receipt of the Loan Documents, Guarantee, and any related instruments, properly executed by the Lender, Borrower, and any other required party other than the Board; and

(4) No material adverse change in the Borrower's ability to repay the loan between the date of the Board's approval and the date the Guarantee is to be issued.

(b) The Board may withdraw its approval of an application and rescind its offer of Guarantee if the Board determines that the Lender or the Borrower cannot, or is unwilling to, provide adequate documentation and proof of compliance with paragraph (a) of this section within the time provided for in the offer.

(c) Only after receipt of all the documentation, required by this section, will the Board sign and deliver the Guarantee.

(d) A Borrower receiving a loan guaranteed by the Board under this Program shall pay a one-time guarantee fee of 0.5 percent of the amount of the principal of the loan. This fee must be paid no later than one year from the issuance of the Guarantee.

§ 400.209 Funding for the Program.

The Act provides funding for the costs incurred by the Government as a result of granting Guarantees under the Program. While pursuing the goals of the Act, it is the intent of the Board to minimize the cost of the Program to the Government. The Board will estimate the risk posed by the guaranteed loans to the funds appropriated for the costs of the Guarantees under the Program and operate the Program accordingly.

§ 400.210 Assignment or transfer of loans.

(a) Neither the Loan Documents nor the Guarantee of the Board, or any interest therein, may be modified, assigned, conveyed, sold or otherwise transferred by the Lender, in whole or in part, without the prior written approval of the Board.

(b) Under no circumstances will the Board permit an assignment or transfer of less than 100 percent of the Loan Documents and Guarantee, nor will it permit an assignment or transfer to be made to an entity which the Board determines not to be an Eligible Lender pursuant to § 400.201.

(c) The proscription under paragraph (a) of this section shall not apply to:

(1) Transfers which occur by operation of law, unless a primary purpose of the transaction leading to such a transfer was to assign, convey or sell the loan note or Guarantee without the necessity of securing the Board's prior written approval; or

(2) An action or agreement by the Lender which has the effect of distributing the risks of the credit among other Lenders if:

(i) Neither the loan note nor the Guarantee is assigned, conveyed, sold, or transferred in whole or in part;

(ii) Both the unguaranteed and guaranteed portions of the loan are treated in the same manner;

(iii) The Lender remains solely responsible for the administration of the loan; and

(iv) The Board's ability to assert any and all defenses available to it under the Guarantee and the law is not adversely affected.

§ 400.211 Lender responsibilities.

(a) *General.* Lender shall comply with all provisions of the Guarantee.

(b) *Standard of care.* The Lender shall exercise due care and diligence in administering the loan as would be exercised by a responsible and prudent banking institution when administering a secured loan of such banking institution's own funds without a Federal guaranty. Such standard shall also apply to any and all approvals, determinations, permissions, acceptances, requirements, or opinion made, given, imposed or reached by Lender.

(c) *Representation to the Board.* In addition to any other representations required by the Guarantee, the Lender shall represent to the Board that it has the ability to, and will, administer the loan, as well as to exercise the Lender's rights and pursue its remedies, including conducting any liquidation of the Security or additional Security in full compliance with the standard of care, without the need for any advice, opinion, determination, recommendation, approval, disapproval, assistance (financial or other) or participation by the Board, except where the Board's consent is expressly required by the Guarantee, or where the Board, in its sole discretion and pursuant to the Guarantee, elects to provide same.

(d) *Covenants.* With respect to any loan guaranteed by the Board pursuant to the Act and this part, the Lender shall require the Loan Documents to contain such affirmative and negative covenants by the Borrower as are required by the terms and conditions of the Guarantee, such as the prohibition on the payment of dividends.

(e) *Monitoring.* In accordance with the Guarantee, the Lender shall monitor Borrower's performance under the Loan Documents to detect any non-compliance by the Borrower with any provision thereof, and will use its best efforts to cause Borrower's timely correction of any such noncompliance and Borrower's compliance with such provision thereafter.

(f) *Reporting.* With respect to any loan guaranteed by the Board pursuant to the Act and this part the Lender shall provide the Board with the following information:

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(1) Audited financial statements for the Borrower for the prior fiscal year;

(2) Projected balance sheet, income statement, and cash flows for the Borrower for each year remaining on the term of the loan within 60 days of the Borrower's fiscal year end; and

(3) A completed signed copy of Form "Quarterly Compliance Statement" that includes information on the recent performance of the loan, within 15 days of the end of each calendar quarter.

(g) *Notices.* All written notices, requests, or demands made to the Board shall be mailed to the Board at the U.S. Department of Commerce, Washington, DC 20230, except as otherwise specified by the Guarantee or as directed by the Board. Lender shall notify the Board in writing without delay of:

(1) Deterioration in the internal risk rating of a loan guaranteed under this Program within 3 business days of such action by the Lender;

(2) The occurrence of each event of default under the Loan Documents or Guarantee promptly, but not later than 3 business days, of the Lender's learning of such occurrence; and

(3) Any other notification requirements as provided by law, or by the terms of the Guarantee or Loan Documents.

§ 400.212 Liquidation.

(a) The Board may take, or direct to be taken, any action in liquidating the Security which the Board determines to be necessary or proper, consistent with Federal law and regulations.

(b) Pursuant to the Guarantee, upon written demand by the Lender and whether or not the Board has made any payment under the Guarantee, the Board, at the Board's sole option shall have the right to require that the Lender, solely or jointly with the Board, conduct to completion the li-

quidation of any or all of the Security. The Board may choose to conduct the liquidation itself.

§ 400.213 Termination of Guarantee.

(a) The Board, in its discretion, shall be entitled to terminate all of the Board's obligations under the Guarantee, without further cause, by giving written notice to the Lender of such termination, in the event that:

(1) The closing of the loan shall not have occurred in accordance with the terms and conditions of the Guarantee;

(2) The Guarantee fee required by § 400.208(d) shall not have been paid;

(3) The Lender shall have released or covenanted not to sue the Borrower or any other guarantor, or agreed to the modification of any obligation of any party to any agreement related to the loan, without the prior written consent of the Board;

(4) Lender has released the Board from its liability and obligations under the Guarantee;

(5) Lender has been repaid in full on the loan;

(6) Lender shall have made any incorrect or incomplete representation to the Board in any material respect in connection with the Application, the Guarantee or the Loan Documents; or

(7) Lender failed to comply with any material provision of the Loan Documents or the Guarantee.

(b) Upon receipt of a written demand for payment made pursuant to the Guarantee, the Board shall be entitled to seek such certifications from the Lender, undertake such audits or investigations, or take such other action as is provided for by law or the Guarantee so as to determine whether the Lender has complied with all of the Lender's obligations under the Guarantee.

§ 400.214 OMB control number. [Reserved]

CHAPTER V—EMERGENCY OIL AND GAS GUARANTEED LOAN BOARD

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PART 500—EMERGENCY OIL AND GAS GUARANTEED LOAN PROGRAM

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Subpart A—General

§ 500.1 Purpose.

This part is issued by the Emergency Oil and Gas Guaranteed Loan Board pursuant to section 552 of title 5 of the United States Code and the Emergency Oil and Gas Guaranteed Loan Act, Chapter 2 of Public Law 106-51. This part contains rules for making and servicing loans to qualified oil and gas guaranteed by the Board.

§ 500.2 Definitions.

(a) *Act* means the Emergency Oil and Gas Guaranteed Loan Program Act, Chapter 2 of Public Law 106-51.

(b) *Administer, administering and administration*, mean the Lender's actions in making, disbursing, servicing (including, but not limited to care, preservation and maintenance of collateral), collecting and liquidating a loan and security.

(c) *Applicant* means the private banking or investment institution applying for a loan guarantee under this part.

(d) *Board* means the Emergency Oil and Gas Guaranteed Loan Board.

(e) *Borrower* means a Qualified Oil and Gas Company which could receive a loan guaranteed by the Board under this Program.

(f) *Guarantee* means the written agreement between the Board and the Lender, and approved by the Borrower, pursuant to which the Board guarantees repayment of a specified percentage of the principal of the loan, including the Special Terms and Conditions, the General Terms and Conditions, and all exhibits thereto.

(g) *Lender* means a private banking or investment institution that is eligible pursuant to § 500.201.

(h) *Loan Documents* mean the loan agreement and all other instruments, and all documentation between the Lender and the Borrower evidencing the making, disbursing, securing, collecting, or otherwise administering of the loan.

(i) *Program* means the Emergency Oil and Gas Guaranteed Loan Program established by the Act.

(j) *Security* means all property, real or personal, required by the provisions of the Guarantee or by the Loan Documents to secure repayment of any indebtedness of the Borrower under the Loan Documents or Guarantee.

(k) *Qualified Oil and Gas Company* means any company that: (A) is (i) an independent oil and gas company (within the meaning of section 57(a)(2)(B)(i) of the Internal Revenue Code of 1986) or; (ii) a small business concern under section 3 of the Small Business Act, 15 U.S.C. 632, (or a company based in Alaska, including an

Alaska Native Corporation created pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*) that is an oil field service company whose main business is providing tools, products, personnel, and technical solutions on a contractual basis to exploration and production operators that drill, complete wells, and produce, transport, refine, and sell hydrocarbons and their byproducts as the main commercial business of the concern or company; and (B) has experienced layoffs, production losses, or financial losses since January 1997.

Subpart B—Board Procedures

§ 500.100 Purpose and scope.

This subpart describes the Board's authorities and organizational structure, the means and rules by which the Board takes actions, and procedures for public access to Board records.

§ 500.101 Composition of the Board.

The Board consists of the Chairman of the Board of Governors of the Federal Reserve System, who acts as Chairman of the Board, the Chairman of the Securities and Exchange Commission, and the Secretary of Commerce.

§ 500.102 Authority of the Board.

Pursuant to the provisions of the Act, the Board is authorized to guarantee loans provided to Qualified Oil and Gas companies by private banking and investment institutions in accordance with the procedures, rules, and regulations established by the Board, to make the determinations authorized by the Act, and to take such other actions as necessary to carry out its functions in accordance with the Act.

§ 500.103 Offices.

The principal offices of the Board are in the U.S. Department of Commerce, Washington, D.C. 20230.

§ 500.104 Meetings and actions of the Board.

(a) *Place and frequency.* The Board meets, on the call of the Chairman, in order to consider matters requiring action by the Board. Time and place for

any such meeting shall be determined by the members of the Board.

(b) *Quorum and voting.* Two voting members of the Board constitute a quorum for the transaction of business. All decisions and determinations of the Board shall be made by a majority vote of the voting members. All votes on determinations of the Board required by the Act shall be recorded in the minutes. A Board member may request that any vote be recorded according to individual Board members.

(c) *Agenda of meetings.* To the extent practicable, an agenda for each meeting shall be distributed to members of the Board at least two days in advance of the date of the meeting, together with copies of materials relevant to the agenda items.

(d) *Minutes.* The Secretary of the Board shall keep minutes of each Board meeting and of action taken without a meeting, a draft of which is to be distributed to each member of the Board as soon as practicable after each meeting or action. To the extent practicable, the minutes of a Board meeting shall be corrected and approved at the next meeting of the Board.

(e) *Use of conference call communications equipment.* Any member may participate in a meeting of the Board through the use of conference call, telephone or similar communications equipment, by means of which all persons participating in the meeting can simultaneously speak to and hear each other. Any member so participating in a meeting shall be deemed present for all purposes. Actions taken by the Board at meetings conducted through the use of such equipment, including the votes of each member, shall be recorded in the usual manner in the minutes of the meetings of the Board.

(f) *Actions between meetings.* When, in the judgment of the Chairman, circumstances occur making it desirable for the Board to consider action when it is not feasible to call a meeting, the relevant information and recommendations for action may be transmitted to the members by the Secretary of the Board and the voting members may communicate their votes to the Chairman in writing (including an action signed in counterpart by each Board

member), electronically, or orally (including telephone communication). Any action taken under this paragraph has the same effect as an action taken at a meeting. Any such action shall be recorded in the minutes.

(g) *Delegations of authority.* The Board may delegate authority, subject to such terms and conditions as the Board deems appropriate, to the Executive Director, the General Counsel, or the Secretary of the Board, to take certain actions not required by the Act to be taken by the Board. All delegations shall be made pursuant to resolutions of the Board and recorded in writing, whether in the minutes of a meeting or otherwise. Any action taken pursuant to delegated authority has the effect of an action taken by the Board.

§ 500.105 Staff.

(a) *Executive Director.* The Executive Director of the Board advises and assists the Board in carrying out its responsibilities under the Act, provides general direction with respect to the administration of the Board's actions, directs the activities of the staff, and performs such other duties as the Board may require.

(b) *General Counsel.* The General Counsel of the Board provides legal advice relating to the responsibilities of the Board and performs such other duties as the Board may require.

(c) *Secretary of the Board.* The Secretary of the Board sends notice of all meetings, prepares minutes of all meetings, maintains a complete record of all votes and actions taken by the Board, has custody of all records of the Board and performs such other duties as the Board may require.

§ 500.106 Ex parte communications.

Oral or written communication, not on the public record, between the Board, or any member of the Board, and any party or parties interested in any matter pending before the Board concerning the substance of that matter is prohibited. This section also applies to the Board's staff and employees of the constituent agencies who are or reasonably may be expected to be involved in the decisional process of the matter pending before the Board.

§ 500.107 Freedom of Information Act.

(a) *Definitions.* All terms used in this section which are defined in 5 U.S.C. 551 or 5 U.S.C. 552 shall have the same meaning in this section. In addition the following definitions apply to this section:

(1) *FOIA*, as used in this section, means the "Freedom of Information Act," as amended, 5 U.S.C. 552.

(2) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(3) *Direct costs* mean those expenditures that the Board actually incurs in searching for, reviewing, and duplicating documents in response to a request made under paragraph (c) of this section. Direct costs include, for example, the labor costs of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits). Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(4) *Duplication* means the process of making a copy of a document in response to a request for disclosure of records or for inspection of original records that contain exempt material or that otherwise cannot be inspected directly. Among others, such copies may take the form of paper, microfilm, audiovisual materials, or machine-readable documentation (e.g., magnetic tape or disk).

(5) *Educational institution* means a preschool, a public or private elementary or secondary school, or an institution of undergraduate higher education, graduate higher education, professional education, or an institution of vocational education that operates a program of scholarly research.

(6) *Noncommercial scientific institution* refers to an institution that is not operated on a "commercial" basis (as that term is used in this section) and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(7) *News* means information about current events or that would be of current interest to the public. Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large, and publishers of newspapers and other periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. “Freelance” journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.

(8) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the general public.

(9) *Review* means the process of examining documents, located in response to a request for access, to determine whether any portion of a document is exempt information. It includes doing all that is necessary to excise the documents and otherwise to prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(10) *Search* means the process of looking for material that is responsive to a request, including page-by-page or line-by-line identification within documents. Searches may be done manually or by computer.

(b) *Records available for public inspection and copying.*—(1) *Types of records made available.* The information in this section is furnished for the guidance of the public and in compliance with the requirements of the Freedom of Information Act, as amended (5 U.S.C. 552) (FOIA). This section sets forth the procedures the Board follows to make publicly available the materials specified in 5 U.S.C. 552(a)(2). These materials shall be made available for inspection and copying at the Board’s Freedom of Information Office pursuant to 5 U.S.C. 552(a)(2). Information routinely provided to the public as part of a regular Board activity (for example, press releases) may be provided to the public without following this section.

(2) *Reading room procedures.* Information available under this section is available for inspection and copying, from 9:00 a.m. to 5:00 p.m. weekdays, at the Freedom of Information Office of the Board, Oil and Gas Guarantee Loan Board, U.S. Department of Commerce, Washington, D.C. 20230.

(3) *Electronic records.* Information available under this section that was created on or after November 1, 1996, shall also be available on the Board’s website, found at www.doc.gov.

(c) *Records available to the public on request.*—(1) *Types of records made available.* All records of the Board that are not available under paragraph (b) of this section shall be made available upon request, pursuant to the procedures in this section and the exceptions set forth in the FOIA. The Board’s policy is to make discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

(2) *Procedures for requesting records.* A request for records shall reasonably describe the records in a way that enables the Board’s staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the Board’s operations. The request shall be submitted in writing to the Secretary of the Board, Oil and Gas Guarantee Loan Board, U.S. Department of Commerce, Washington, D.C. 20230; or sent by facsimile to the Secretary of the Board. The request shall be clearly marked *FREEDOM OF INFORMATION ACT REQUEST*.

(3) *Contents of request.* The request shall contain the following information:

(i) The name and address of the requester, and the telephone number at which the requester can be reached during normal business hours;

(ii) Whether the requested information is intended for commercial use, or whether the requester represents an educational or noncommercial scientific institution, or news media;

(iii) A statement agreeing to pay the applicable fees, or a statement identifying any fee limitation desired, or a

request for a waiver or reduction of fees that satisfies paragraph (f) of this section.

(d) *Processing requests.*—(1) *Priority of responses.* The date of receipt for any request, including one that is addressed incorrectly or that is referred to the Board by another agency, is the date the Secretary of the Board actually receives the request. The Secretary of the Board shall normally process requests in the order they are received. However, in the Secretary of the Board's discretion, the Board may use two or more processing tracks by distinguishing between simple and more complex requests based on the number of pages involved, or some other measure of the amount of work and/or time needed to process the request, and whether the request qualifies for expedited processing as described in paragraph (d)(2) of this section. When using multitrack processing, the Secretary of the Board may provide requesters in the slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing. The Secretary of the Board shall contact the requester by telephone or by letter, whichever is most efficient in each case.

(2) *Expedited processing.* (i) A person may request expedited access to records by submitting a statement, certified to be true and correct to the best of that person's knowledge and belief, that demonstrates a compelling need for the records, as defined in 5 U.S.C. 552(a)(6)(E)(v).

(ii) The Secretary of the Board shall notify a requester of the determination whether to grant or deny a request for expedited processing within ten working days of receipt of the request. If the Secretary of the Board grants the request for expedited processing, the Board shall process the request for access to information as soon as practicable. If the Secretary of the Board denies a request for expedited processing, the requester may file an appeal pursuant to the procedures set forth in paragraph (e) of this section, and the Board shall respond to the appeal within twenty days after the appeal was received by the Board.

(3) *Time limits.* The time for response to requests shall be 20 working days, except:

(i) In the case of expedited treatment under paragraph (d)(2) of this section;

(ii) Where the running of such time is suspended for payment of fees pursuant to paragraph (f)(2)(ii) of this section;

(iii) Where the estimated charge is less than \$250, and the requester does not guarantee payment pursuant to paragraph (f)(2)(i) of this section; or

(iv) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B)(iii), the time limit may be extended for a period of time not to exceed 10 working days as provided by written notice to the requester, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; or such alternative time period as mutually agreed to by the Secretary of the Board and the requester when the Secretary of the Board notifies the requester that the request cannot be processed in the specified time limit.

(4) *Response to request.* In response to a request that satisfies paragraph (c) of this paragraph, an appropriate search shall be conducted of records in the custody and control of the Board on the date of receipt of the request, and a review made of any responsive information located. The Secretary of the Board shall notify the requester of:

(i) The Secretary of the Board's determination of the request and the reasons therefor;

(ii) The information withheld, and the basis for withholding; and

(iii) The right to appeal any denial or partial denial, pursuant to paragraph (e) of this section.

(5) *Referral to another agency.* To the extent a request covers documents that were created by, obtained from, classified by, or is in the primary interest of another agency, the Secretary of the Board may refer the request to that agency for a direct response by that agency and inform the requester promptly of the referral. The Secretary of the Board shall consult with another Federal agency before responding to a requester if the Board receives a request for a record in which:

(i) Another Federal agency subject to the FOIA has a significant interest, but not the primary interest; or

(ii) Another Federal agency not subject to the FOIA has the primary interest or a significant interest. Ordinarily, the agency that originated a record will be presumed to have the primary interest in it.

(6) *Providing responsive records.* (i) A copy of records or portions of records responsive to the request shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the requester elects to take delivery of the documents at the Board's Freedom of Information Office or makes other acceptable arrangements, or the Secretary of the Board deems it appropriate to send the documents by another means. The Secretary of the Board shall provide a copy of the record in any form or format requested if the record is readily reproducible in that form or format, but the Secretary of the Board need not provide more than one copy of any record to a requester.

(ii) The Secretary of the Board shall provide any reasonably segregable portion of a record that is responsive to the request after deleting those portions that are exempt under the FOIA or this section.

(iii) Except where disclosure is expressly prohibited by statute, regulation, or order, the Secretary of the Board may authorize the release of records that are exempt from mandatory disclosure whenever the Board or designated Board members determine that there would be no foreseeable harm in such disclosure.

(iv) The Board is not required in response to the request to create records or otherwise to prepare new records.

(7) *Prohibition against disclosure.* Except as provided in this part, no officer, employee, or agent of the Board shall disclose or permit the disclosure of any unpublished information of the Board to any person (other than Board officers, employees, or agents properly entitled to such information for the performance of official duties), unless required by law.

(e) *Appeals.* (1) Any person denied access to Board records requested under paragraph (c) of this section, denied ex-

pedited processing under paragraph (d) of this section, or denied a waiver of fees under paragraph (f) of this section may file a written appeal within 30 calendar days after the date of such denial with the Board. The written appeal shall prominently display the phrase *FREEDOM OF INFORMATION ACT APPEAL* on the first page, and shall be addressed to the General Counsel of the Board, Oil and Gas Guaranteed Loan Board, U.S. Department of Commerce, Washington, D.C. 20230; or sent by facsimile to the General Counsel of the Board. The appeal shall include a copy of the original request, the initial denial, if any, and a statement of the reasons why the requested records should be made available and why the initial denial was in error.

(2) The General Counsel of the Board shall make a determination regarding any appeal within 20 working days of actual receipt of the appeal, and the determination letter shall notify the appealing party of the right to seek judicial review in event of denial.

(f) *Fee schedules; waiver of fees.*—(1) *Fee schedule.* The fees applicable to a request for records pursuant to paragraph (c) of this section are set forth in the uniform fee schedule at the end of this paragraph (b).

(i) *Search.* (A) Search fees shall be charged for all requests—other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media—subject to the limitations of paragraph (f)(1)(iv) of this section. The Secretary of the Board shall charge for time spent searching even if no responsive record is located or if the Secretary of the Board withholds the record(s) located as entirely exempt from disclosure. Search fees shall be the direct costs of conducting the search by the involved employees.

(B) For computer searches of records, requesters will be charged the direct costs of conducting the search, although certain requesters (as provided in paragraph (f)(3) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (f)(3)) are entitled to the cost equivalent of two hours of manual

search time without charge. These direct costs include the costs, attributable to the search, of operating a central processing unit and operator/programmer salary.

(ii) *Duplication.* Duplication fees will be charged to all requesters, subject to the limitations of paragraph (f)(1)(iv) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee shall be 15 cents per page. For copies produced by computer, such as tapes or printouts, the Secretary of the Board shall charge the direct costs, including operator time, of producing the copy. For other forms of duplication, the Secretary of the Board will charge the direct costs of that duplication.

(iii) *Review.* Review fees shall be charged to requesters who make a commercial use request. Review fees shall be charged only for the initial record review—the review done when the Secretary of the Board determines whether an exemption applies to a particular record at the initial request level. No charge will be made for review at the administrative appeal level for an exemption already applied. However, records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies, and the costs of that review are chargeable. Review fees shall be the direct costs of conducting the review by the involved employees.

(iv) *Limitations on charging fees.* (A) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

(B) No search fee or review fee will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(C) Whenever a total fee calculated under this paragraph is \$25 or less for any request, no fee will be charged.

(D) For requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than \$25.

(2) *Payment procedures.* All persons requesting records pursuant to paragraph

(c) of this section shall pay the applicable fees before the Secretary of the Board sends copies of the requested records, unless a fee waiver has been granted pursuant to paragraph (f)(6) of this section. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(i) *Advance notification of fees.* If the estimated charges are likely to exceed \$25, the Secretary of the Board shall notify the requester of the estimated amount, unless the requester has indicated a willingness to pay fees as high as those anticipated. Upon receipt of such notice, the requester may confer with the Secretary of the Board to reformulate the request to lower the costs. The processing of the request shall be suspended until the requester provides the Secretary of the Board with a written guarantee that payment will be made upon completion of the processing.

(ii) *Advance payment.* The Secretary of the Board shall require advance payment of any fee estimated to exceed \$250. The Secretary of the Board shall also require full payment in advance where a requester has previously failed to pay a fee in a timely fashion. If an advance payment of an estimated fee exceeds the actual total fee by \$1 or more, the difference shall be refunded to the requester. The time period for responding to requests under paragraph (d)(4) of this section, and the processing of the request shall be suspended until the Secretary of the Board receives the required payment.

(iii) *Late charges.* The Secretary of the Board may assess interest charges when fee payment is not made within 30 days of the date on which the billing was sent. Assessment of such interest will commence on the 31st day following the day on which the billing was sent. Interest is at the rate prescribed in 31 U.S.C. 3717.

(3) *Categories of uses.* The fees assessed depend upon the fee category. In determining which category is appropriate, the Secretary of the Board shall look to the identity of the requester and the intended use set forth in the request for records. Where a requester's description of the use is insufficient to make a determination, the Secretary

of the Board may seek additional clarification before categorizing the request.

(i) *Commercial use requester.* The fees for search, duplication, and review apply when records are requested for commercial use.

(ii) *Educational, non-commercial scientific institutions, or representatives of the news media requesters.* The fees for duplication apply when records are not sought for commercial use, and the requester is a representative of the news media or an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research. The first 100 pages of duplication, however, will be provided free.

(iii) *All other requesters.* For all other requests, the fees for search and duplication apply. The first two hours of search time and the first 100 pages of duplication, however, will be provided free.

(4) *Nonproductive search.* Fees for search may be charged even if no responsive documents are found. Fees for search and review may be charged even if the request is denied.

(5) *Aggregated requests.* A requester may not file multiple requests at the same time, solely in order to avoid payment of fees. If the Secretary of the Board reasonably believes that a requester is separating a request into a series of requests for the purpose of evading the assessment of fees or that several requesters appear to be acting together to submit multiple requests solely in order to avoid payment of fees, the Secretary of the Board may aggregate such requests and charge accordingly. It is considered reasonable for the Secretary of the Board to presume that multiple requests by one requester on the same topic made within a 30-day period have been made to avoid fees.

(6) *Waiver or reduction of fees.* A request for a waiver or reduction of the fees, and the justification for the waiver, shall be included with the request for records to which it pertains. If a waiver is requested and the requester has not indicated in writing an agreement to pay the applicable fees if the waiver request is denied, the time for response to the request for documents, as set forth in paragraph (4)(d) of this

section, shall not begin until a determination has been made on the request for a waiver or reduction of fees.

(i) *Standards for determining waiver or reduction.* The Secretary of the Board may grant a waiver or reduction of fees where it is determined both that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government, and that the disclosure of information is not primarily in the commercial interest of the requester. In making this determination, the following factors shall be considered:

(A) Whether the subject of the records concerns the operations or activities of the government;

(B) Whether disclosure of the information is likely to contribute significantly to public understanding of government operations or activities;

(C) Whether the requester has the intention and ability to disseminate the information to the public;

(D) Whether the information is already in the public domain;

(E) Whether the requester has a commercial interest that would be furthered by the disclosure; and, if so,

(F) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(ii) *Contents of request for waiver.* A request for a waiver or reduction of fees shall include a clear statement of how the request satisfies the criteria set forth in paragraph (f)(6)(i) of this section.

(iii) *Burden of proof.* The burden shall be on the requester to present evidence or information in support of a request for a waiver or reduction of fees.

(iv) *Determination by Secretary of the Board.* The Secretary of the Board shall make a determination on the request for a waiver or reduction of fees and shall notify the requester accordingly. A denial may be appealed to the Board in accordance with paragraph (e) of this section.

(7) *Uniform fee schedule.*

| Service | Rate |
|--|---|
| (i) Manual search | Actual salary rate of employee involved, plus 16 percent of salary rate. |
| (ii) Computerized search | Actual direct cost, including operator time. |
| (iii) Duplication of records: (A) Paper copy reproduction (B) Other reproduction (e.g., computer disk or printout, microfilm, microfiche, or microform). | \$.15 per page. Actual direct cost, including operator time. |
| (iv) Review of records (includes preparation for release, i.e. excising). | Actual salary rate of employee conducting review, plus 16 percent of salary rate. |

(g) *Request for confidential treatment of business information.*—(1) *Submission of request.* Any submitter of information to the Board who desires confidential treatment of business information pursuant to 5 U.S.C. 552(b)(4) shall file a request for confidential treatment with the Board at the time the information is submitted or a reasonable time after submission.

(2) *Form of request.* Each request for confidential treatment of business information shall state in reasonable detail the facts supporting the commercial or financial nature of the business information and the legal justification under which the business information should be protected. Conclusory statements that release of the information would cause competitive harm generally will not be considered sufficient to justify confidential treatment.

(3) *Designation and separation of confidential material.* All information considered confidential by a submitter shall be clearly designated “*PROPRIETARY*” or “*BUSINESS CONFIDENTIAL*” in the submission and separated from information for which confidential treatment is not requested. Failure to segregate confidential commercial or financial information from other material may result in release of the nonsegregated material to the public without notice to the submitter.

(h) *Request for access to confidential commercial or financial information.*—(1) *Request for confidential commercial or financial information.* A request by a submitter for confidential treatment of any business information shall be considered in connection with a request for access to that information.

(2) *Notice to the submitter.* (i) The Secretary of the Board shall notify a submitter who requested confidential treatment of information pursuant to 5 U.S.C. 552(b)(4), of the request for access.

(ii) Absent a request for confidential treatment, the Secretary of the Board may notify a submitter of a request for access to submitter’s business information if the Secretary of the Board reasonably believes that disclosure of the information may cause substantial competitive harm to the submitter.

(iii) The notice given to the submitter by mail, return receipt requested, shall be given as soon as practicable after receipt of the request for access, and shall describe the request and provide the submitter seven working days from the date of notice, to submit written objections to disclosure of the information. Such statement shall specify all grounds for withholding any of the information and shall demonstrate why the information which is considered to be commercial or financial information, and that the information is a trade secret, is privileged or confidential, or that its disclosure is likely to cause substantial competitive harm to the submitter. If the submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to the release of the information. Information a submitter provides under this paragraph may itself be subject to disclosure under the FOIA.

(3) *Exceptions to notice to submitter.* Notice to the submitter need not be given if:

(i) The Secretary of the Board determines that the request for access should be denied;

(ii) The requested information lawfully has been made available to the public;

(iii) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(iv) The submitter’s claim of confidentiality under 5 U.S.C. 552(b)(4) appears obviously frivolous or has already been denied by the Secretary of the Board, except that in this last instance the Secretary of the Board shall give the submitter written notice of

the determination to disclose the information at least seven working days prior to disclosure.

(4) *Notice to requester.* At the same time the Secretary of the Board notifies the submitter, the Secretary of the Board also shall notify the requester that the request is subject to the provisions of this section.

(5) *Determination by Secretary of the Board.* The Secretary of the Board's determination whether or not to disclose any information for which confidential treatment has been requested pursuant to this section shall be communicated to the submitter and the requester immediately. If the Secretary of the Board determines to disclose the business information over the objection of a submitter, the Secretary of the Board shall give the submitter written notice via mail, return receipt requested, or similar means, which shall include:

(i) A statement of reason(s) why the submitter's objections to disclosure were not sustained;

(ii) A description of the business information to be disclosed; and

(iii) A statement that the component intends to disclose the information seven working days from the date the submitter receives the notice.

(6) *Notice of lawsuit.* The Secretary of the Board shall promptly notify any submitter of information covered by this section of the filing of any suit against the Board to compel disclosure of such information, and shall promptly notify a requester of any suit filed against the Board to enjoin the disclosure of requested documents.

§ 500.108 Restrictions on lobbying.

(a) No funds received through a loan guaranteed under this Program may be expended by the recipient of a Federal contract, grant, loan, loan Guarantee, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan or loan Guarantee, the entering into of any cooperative agree-

ment, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, loan Guarantee, or cooperative agreement.

(b) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in the application form, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or Guarantee.

(c) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a Standard Form-LLL if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or Guarantee.

(d) Each person shall file a certification, contained in the application form, and a disclosure form (Standard Form-LLL), if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

(e) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or Guarantee a loan exceeding \$150,000, unless such person previously filed a certification, and a disclosure form, if required, under paragraph (c) of this section.

(f) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (d) or (e) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

§ 500.109 Government-wide debarment and suspension (nonprocurement).

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a government-wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and non-financial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect. The Board shall review the List of Debarred entities prior to making final loan Guarantee decisions. Suspension or debarment may be a basis for denying a loan Guarantee.

(b) This section applies to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of this section such transactions will be referred to as "covered transactions".

(1) *Covered transaction.* For purposes of this section, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) Primary covered transaction. Except as noted in paragraph (b)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan Guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person.

(ii) Lower tier covered transaction. A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction;

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently \$100,000) under a primary covered transaction;

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons may include loan officers or chief executive officers acting as principal investigators and providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility

(but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of this section would be prohibited by law.

(3) *Board covered transactions.* This section applies to the Board's loan Guarantees, subcontracts and transactions at any tier that are charges as direct or indirect costs, regardless of type.

(c) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to paragraph (l) of this section.

(d) *Lower tier covered transactions.* Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see paragraph (b)(1)(ii) of this section) for the period of their exclusion.

(e) *Exceptions.* Debarment or suspension does not affect a person's eligibility for—

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or par-

tially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of this section would be prohibited by law.

(f) Persons who are ineligible are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

(g) Persons who accept voluntary exclusions are excluded in accordance with the terms of their settlements. The Board shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

(h) The Board may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with the Executive Order.

(i) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(j) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible or voluntarily excluded, except as provided in paragraph (h) of this section.

(k) Except as permitted paragraphs (h) or (i) of this section, a participant shall not knowingly do business under a covered transaction with a person who is—

- (1) Debarred or suspended;
- (2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or
- (3) Ineligible for or voluntarily excluded from the covered transaction.

(l) Violation of the restriction under paragraph (k) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(m) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

§ 500.110 Amendments.

The Board's rules in this chapter may be adopted or amended, or new rules may be adopted, only by majority vote of the Board. Authority to adopt or amend these rules may not be delegated.

Subpart C—Oil and Gas Guaranteed Loans

§ 500.200 Eligible Borrower.

(a) An eligible Borrower must be a Qualified Oil and Gas Company that can demonstrate:

- (1) Credit is not otherwise available to it under reasonable terms or conditions sufficient to meet its financing

needs, as reflected in the financial and business plans of the company;

(2) The prospective earning power of that company, together with the character and value of the security pledged, furnish reasonable assurance of repayment of the loan to be guaranteed in accordance with its terms;

(3) The company has agreed to permit audits by the General Accounting Office and an independent auditor acceptable to the Board prior to the issuance of the guarantee and while any such guaranteed loan is outstanding; and

(4) It has experienced layoffs, production losses, or financial losses between January 1, 1997, and the date of application for the Guarantee, demonstrated as a comparison between employment, production, or net income existing on January 1, 1997 and on the date of application.

(b) The Lender must provide with its application a letter from at least one lending institution other than the Lender to which the Borrower has applied for financial assistance, since January 1, 1997, indicating that the Borrower was denied for substantially the same loan they are now applying for, and the reasons the Borrower was unable to obtain the financing for which it applied. In addition, the Lender applying for a guarantee under this Program must certify that it would not make the loan without the Board's guarantee.

§ 500.201 Eligible Lender.

(a) A lender eligible to apply to the Board for a Guarantee of a loan must be:

- (1) A banking institution, such as a commercial bank or trust company, subject to regulation by the Federal banking agencies enumerated in 12 U.S.C. § 1813; or

(2) An investment institution, such as an investment bank, commercial finance company, or insurance company, that is currently engaged in commercial lending in the normal course of its business.

(b) Status as a Lender under paragraph (a) of this section does not assure that the Board will issue the Guarantee sought, or otherwise preclude the Board from declining to issue a Guarantee. In addition to evaluating

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an application pursuant to § 500.207, in making a determination to issue a Guarantee to a Lender, the Board will assess:

(1) The Lender's level of regulatory capital, in the case of banking institutions, or net worth, in the case of investment institutions;

(2) Whether the Lender possesses the ability to administer the loan, as required by § 500.211(b), including its experience with loans to oil and gas companies;

(3) The scope, volume and duration of the Lender's activity in administering loans;

(4) The performance of the Lender's loan portfolio, including its current delinquency rate;

(5) The Lender's loss rate as a percentage of loan amounts for its current fiscal year; and

(6) Any other matter the Board deems material to its assessment of the Lender.

(c) In the case of the refinancing of an existing credit, the applicant must be a different lender than the holder of the existing credit.

§ 500.202 Loan amount.

The aggregate amount of loan principal guaranteed under this Program to a single Qualified Oil and Gas Company may not exceed \$10 million.

§ 500.203 Guarantee percentage.

A guarantee issued by the Board may not exceed 85 percent of the amount of the principal of a loan to a Qualified Oil and Gas Company.

§ 500.204 Loan terms.

(a) All loans guaranteed under the Program shall be due and payable in full no later than December 31, 2010.

(b) Loans guaranteed under the Program must bear a rate of interest determined by the Board to be reasonable. The reasonableness of an interest rate will be determined with respect to current average yields on outstanding obligations of the United States with remaining periods of maturity comparable to the term of the loan sought to be guaranteed. The Board may reject an application to guarantee a loan if it determines the interest rate of such loan to be unreasonable.

(c)(1) The performance of all of the Borrower's obligations under the Loan Documents shall be secured by, and shall have the priority in, such Security as provided for within the terms and conditions of the Guarantee.

(2) Without limiting the Lender's or Borrower's obligations under paragraph (c) of this section, at a minimum, the loan shall be secured by:

(i) A fully perfected and enforceable security interest and or lien, with first priority over conflicting security interests or other liens in all property acquired, improved, or derived from the loan funds; and

(ii) A fully perfected and enforceable security interest and or lien in any other property of the Borrower's pledged to secure the loan, including accessions, replacements, proceeds, or property given by a third party as Security for the loan, the priority of which shall be, at a minimum, equal in status with the existing highest voluntarily granted or acquired interest or lien;

(3) The entire loan will be secured by the same Security with equal lien priority for the guaranteed and the unguaranteed portions of the loan. The unguaranteed portion of the loan will neither be paid first nor given any preference over the guaranteed portion.

(4) An Applicant's compliance with paragraph (c)(2) of this section does not assure a finding of reasonable assurance of repayment, or assure the Board's Guarantee of the loan.

(d) An eligible Lender may assess and collect from the Borrower such other fees and costs associated with the application and origination of the loan as are reasonable and customary, taking into consideration the amount and complexity of the credit. The Board may take such other fees and costs into consideration when determining whether to offer a Guarantee to the Lender.

[64 FR 57947, Oct. 27, 1999, as amended at 64 FR 72024, Dec. 23, 1999]

§ 500.205 Application process.

(a) *Application process.* An original application and three copies must be received by the Board no later than 8 p.m. EST, January 31, 2000, in the U.S. Department of Commerce, Washington,

DC 20230. Applications which have been provided to a delivery service on or before January 30, 2000, with "delivery guaranteed" before 8 p.m. on January 30, 2000, will be accepted for review if the Applicant can document that the application was provided to the delivery service with delivery to the address listed in this section guaranteed prior to the closing date and time. A postmark of January 30, 2000, is not sufficient to meet this deadline as the application must be received by the required date and time. Applications will not be accepted via facsimile machine transmission or electronic mail.

(b) Applications shall contain the following:

(1) A completed Form, "Application for Oil and Gas Guarantee Loan";

(2) The information required for the completion of Form "Environmental Assessment and Compliance Findings for Related Environmental Laws" and attachments, as required by § 500.206(a)(2)(i)(D), unless the project is categorically excluded under § 500.206(b);

(3) All Loan Documents that will be signed by the Lender and the Borrower, if the application is approved, including all terms and conditions of, and Security or additional Security to assure the Borrower's performance under, the loan;

(4) Certification by the chairman of the board and the chief executive officer of the Borrower acknowledging that the Borrower is aware that the Lender is applying to the Board for a Guarantee of a loan under the Program, as described in the Loan Documents, and agreeing to permit audits by the General Accounting Office, its designee, an independent auditor acceptable to the Board prior to the issuance of the Guarantee and annually thereafter while such guarantee is outstanding;

(5) The Lender's full written underwriting analysis of the loan to be guaranteed by the Board;

(6) A certification that the Lender has followed the same loan underwriting analysis with the loan to be guaranteed as it would follow for a loan not guaranteed by the Government; and a certification by the Lender, that the loan, Lender, and Borrower

meet each of the requirements of the Program as set forth in the Act and the Board's rules in this part;

(7) A description of all Security for the loan, including, as applicable, current appraisal of real and personal property, copies of any appropriate environmental site assessments, and current personal and corporate financial statements of any guarantors for the same periods as required for the Borrower. Appraisals of real property shall be prepared by State licensed or certified appraisers, and be consistent with the "Uniform Standards of Professional Appraisal Practice," promulgated by the Appraisal Standards Board of the Appraisal Foundation. Financial statements of guarantors shall be prepared by independent Certified Public Accountants;

(8)(i) An independent oil and gas company, as defined in section 201(c)(3)(A)(i) of the Act, is required to submit:

(A) For loans less than \$5 million, three years of financial statements reviewed by a certified public accountant following generally accepted accounting principles, as well as any interim financial statements; or

(B) For loans of \$5 million or greater, three years of financial statements must be submitted. The most recent year's statement must be audited by an independent certified public accountant. Statements from the prior two years must be reviewed by a certified public accountant following generally accepted accounting principles. In addition, any interim financial statements and associated notes must be submitted as well.

(ii) A service company, as defined in section 201(c)(3)(A)(ii) of the Act, is required to submit consolidated financial statements of the Borrower for the previous three years that have been audited by an independent certified public accountant, including any associated notes, as well as any interim financial statements and associated notes.

(9) A five year history and five year projection for revenue, cash flow, average realized prices and average realized production costs. If the loan funds are to be used to purchase substantial assets of an existing firm, a pro forma

balance sheet at startup, and five years projected year end balance sheets and income statement at start-up;

(10) Documentation that credit is not otherwise available to the borrower under reasonable terms or conditions sufficient to meet its financial needs, as reflected in the financial or business plan of that company. The Lender must provide with its application those items required by § 500.200(b);

(11) Documentation sufficient to demonstrate that the Lender is eligible under § 500.201(a) and to allow the Board to make a determination to issue a Guarantee to such Lender as set forth in § 500.201(b); and

(12) A report as to the Borrower's designation of the nature and value of project reserves from an independent petroleum engineer acceptable to the Board.

(c) No Guarantee will be made if either the Borrower or Lender has an outstanding, delinquent Federal debt until:

(1) The delinquent account has been paid in full;

(2) A negotiated repayment schedule is established and at least one payment has been received; or

(3) Other arrangements, satisfactory to the agency responsible for collecting the debt, are made.

[64 FR 57947, Oct. 27, 1999, as amended at 64 FR 72024, Dec. 23, 1999]

§ 500.206 Environmental requirements.

(a)(1) *In General.* Environmental assessments of the Board's actions will be conducted in accordance with applicable statutes, regulations, and Executive Orders. Therefore, each application for a Guarantee under the Program must be accompanied by information necessary for the Board to meet the requirements of applicable law.

(2) *Actions requiring compliance with NEPA.* (i) The types of actions classified as "major Federal actions" subject to NEPA procedures are discussed generally in 40 CFR parts 1500 through 1508.

(ii) With respect to this Program, these actions typically include:

(A) Any project, permanent or temporary, that will involve construction and/or installations;

(B) Any project, permanent or temporary, that will involve ground disturbing activities; and

(C) Any project supporting renovation, other than interior remodeling.

(3) *Environmental information required from the Lender.* (i) Environmental data or documentation concerning the use of the proceeds of any loan guaranteed under this Program must be provided by the Lender to the Board to assist the Board in meeting its legal responsibilities. The Lender may obtain this information from the Borrower. Such information includes:

(A) Documentation for an environmental threshold review from qualified data sources, such as a Federal, State or local agency with expertise and experience in environmental protection, or other sources, qualified to provide reliable environmental information;

(B) Any previously prepared environmental reports or data relevant to the loan at issue;

(C) Any environmental review prepared by Federal, State, or local agencies relevant to the loan at issue;

(D) The information required for the completion of Form XYZ, "Environmental Assessment and Compliance Findings for Related Environmental Laws;" and

(E) Any other information that can be used by the Board to ensure compliance with environmental laws.

(ii) All information supplied by the Lender is subject to verification by the Board.

(b) The regulations of the Council on Environmental Quality implementing NEPA require the Board to provide public notice of the availability of project specific environmental documents such as environmental impact statements, environmental assessments, findings of no significant impact, records of decision etc., to the affected public. See 40 CFR 1506.6(b). Environmental information concerning specific projects can be obtained from the Board by contacting: Executive Director, Emergency Oil and Gas Guaranteed Loan Board, U.S. Department of Commerce, Washington, DC 20230.

(c) *National Environmental Policy Act.*

(1) *Purpose.* The purpose of this paragraph (c) is to adopt procedures for

compliance with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, by the Board. This paragraph supplements regulations at 40 CFR Chapter V.

(2) *Definitions.* For purposes of this section, the following definitions apply:

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and for which neither an environmental assessment nor an environmental impact statement is required.

Environmental assessment means a document that briefly discusses the environmental consequences of a proposed action and alternatives prepared for the purposes set forth in 40 CFR 1508.9.

EIS means an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA.

FONSI means a finding of no significant impact on the quality of the human environment after the completion of an environmental assessment.

NEPA means the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*

Working Capital Loan means money used by an ongoing business concern to fund its existing operations.

(3) *Delegations to Executive Director.* (i) All incoming correspondence from Council on Environmental Quality (CEQ) and other agencies concerning matters related to NEPA, including draft and final EIS, shall be brought to the attention of the Executive Director. The Executive Director will prepare or, at his or her discretion, coordinate replies to such correspondence.

(ii) With respect to actions of the Board, the Executive Director will:

(A) Ensure preparation of all necessary environmental assessments and EISs;

(B) Maintain a list of actions for which environmental assessments are being prepared;

(C) Revise this list at regular intervals, and send the revisions to the Environmental Protection Agency;

(D) Make the list available for public inspection;

(E) Maintain a list of EISs; and

(F) Maintain a file of draft and final EISs.

(4) *Categorical exclusions.* (i) This paragraph describes various classes of Board actions that normally do not have a significant impact on the human environment and are categorically excluded. The word "normally" is stressed; there may be individual cases in which specific factors require contrary action.

(ii) Subject to the limitations in paragraph (c)(4)(iii) of this section, the actions described in this paragraph have been determined not to have a significant impact on the quality of the human environment. They are categorically excluded from the need to prepare an environmental assessment or an EIS under NEPA.

(A) Guarantees of working capital loans; and

(B) Guarantees of loans for the refinancing of outstanding indebtedness of the Borrower, regardless of the purpose for which the original indebtedness was incurred.

(iii) Actions listed in paragraph (c)(4)(ii) of this section that otherwise are categorically excluded from NEPA review are not necessarily excluded from review if they would be located within, or in other cases, potentially affect:

(A) A floodplain;

(B) A wetland;

(C) Important farmlands, or prime forestlands or rangelands;

(D) A listed species or critical habitat for an endangered species;

(E) A property that is listed on or may be eligible for listing on the National Register of Historic Places;

(F) An area within an approved State Coastal Zone Management Program;

(G) A coastal barrier or a portion of a barrier within the Coastal Barrier Resources System;

(H) A river or portion of a river included in, or designated for, potential addition to the Wild and Scenic Rivers System;

(I) A sole source aquifer recharge area;

(J) A State water quality standard (including designated and/or existing beneficial uses and anti-degradation requirements); or

(K) The release or disposal of regulated substances above the levels set forth in a permit or license issued by an appropriate regulatory authority.

(5) *Responsibilities and procedures for preparation of an environmental assessment.* (i) The Executive Director will request that the Lender and Borrower provide information concerning all potentially significant environmental impacts of the Borrower's proposed project pursuant to 13 CFR 500.206. The Executive Director, consulting at his discretion with CEQ, will review the information provided by the Lender and Borrower. Though no specific format for an environmental assessment is prescribed, it shall be a separate document and should include the following in conformance with 40 CFR 1508.9:

(A) *Description of the environment.* The existing environmental conditions relevant to the Board's analysis determining the environmental impacts of the proposed project, should be described. The no action alternative also should be discussed;

(B) *Documentation.* Citations to information used to describe the existing environment and to assess environmental impacts should be clearly referenced and documented. Such references should include, as appropriate, but not be limited to, local, tribal, regional, State, and Federal agencies, as well as, public and private organizations and institutions;

(C) *Evaluating environmental consequences of proposed actions.* A brief discussion should be included of the need for the proposal, of alternatives as required by 42 U.S.C. 4332(2)(E) and their environmental impacts. The discussion of the environmental impacts should include measures to mitigate adverse impacts and any irreversible or irretrievable commitments of resources to the proposed project.

(ii) The Executive Director, in preparing an environmental assessment, may:

(A) Tier upon the information contained in a previous EIS, as described in 40 CFR 1502.20;

(B) Incorporate by reference reasonably available material, as described in 40 CFR 1502.21; and/or

(C) Adopt a previously completed EIS reasonably related to the project for

which the proceeds of the loan sought to be guaranteed under the Program will be used, as described in 40 CFR 1506.3.

(iii) Because of the statute's admonition to the Board to make its decisions as soon as possible after receiving applications, the Board will not:

(A) Publish notice of intent to prepare an environmental assessment, as described in 40 CFR 1501.7;

(B) Conduct scoping, as described in 40 CFR 1501.7; and

(C) Seek comments on the environmental assessment, as described in 40 CFR 1503.1.

(iv) If, on the basis of an environmental assessment, it is determined that an EIS is not required, a FONSI, as described in 40 CFR 1508.13 will be prepared. The FONSI will include the environmental assessment or a summary of it and be available to the public from the Board. The Executive Director shall maintain a record of these decisions, making them available to interested parties upon request. Requests should be directed to the Executive Director Emergency Oil and Gas Guarantee Loan Program, 14th Street and Constitution Avenue, NW., Washington DC 20230. Prior to a final loan guarantee decision, a copy of the NEPA documentation shall be sent to their Board for consideration.

(6) *Responsibilities and procedures for preparation of an environmental impact statement.* (i) If after an environmental assessment has been completed, it is determined that an EIS is necessary, it and other related documentation will be prepared by the Executive Director in accordance with section 102(2)(c) of NEPA, this section, and 40 CFR parts 1500 through 1508. The Executive Director may seek additional information from the applicant in preparing the EIS. Once the document is prepared, it shall be submitted to the Board. If the Board considers a document unsatisfactory, it shall be returned to the Executive Director for revision or supplementation prior to a loan guarantee decision; otherwise the Board will transmit the document to the Environmental Protection Agency.

(ii)(A) The following procedures, as discussed in 40 CFR parts 1500 through

1508, will be followed in preparing an EIS:

(1) The format and contents of the draft and final EIS shall be as discussed in 40 CFR 1502.

(2) The requirements of 40 CFR 1506.9 for filing of documents with the Environmental Protection Agency shall be followed.

(3) The Executive Director, consulting at his discretion with CEQ, shall examine carefully the basis on which supportive studies have been conducted to assure that such studies are objective and comprehensive in scope and depth.

(4) NEPA requires that the decision making "utilize a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts." 42 U.S.C. 4332(A). If such disciplines are not present on the Board staff, appropriate use should be made of personnel of Federal, State, and local agencies, universities, non-profit organizations, or private industry.

(B) Until the Board issues a record of decision as provided in 40 CFR 1502.2 no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(3) 40 CFR 1506.10 places certain limitations on the timing of Board decisions on taking "major Federal actions." A loan guarantee shall not be made before the times set forth in 40 CFR 1506.10.

(iii) A public record of decision stating what the decision was; identifying alternatives that were considered, including the environmentally preferable one(s); discussing any national considerations that entered into the decision; and summarizing a monitoring and enforcement program if applicable for mitigating the environmental effects of a proposal; will be prepared. This record of decision will be prepared at the time the decision is made.

[64 FR 57947, Oct. 27, 1999, as amended at 64 FR 72024, Dec. 23, 1999]

§ 500.207 Application evaluation.

(a) *Eligibility screening.* Applications will be reviewed to determine whether the Lender and Borrower are eligible, the information required under § 500.205(b) is complete, and the proposed loan complies with applicable statutes and regulations. The Board can at any time reject an application that does not meet these requirements.

(b) *Evaluation criteria.* Applications that are determined to be eligible pursuant to paragraph (a) of this section shall be subject to a substantive review, on a competitive basis, by the Board based upon the following evaluation factors, in order of importance:

(1) The ability of the Borrower to repay the loan by the date specified in the Loan Document, which shall be no later than December 31, 2010;

(2) The adequacy of the proposed provisions to protect the Government, including sufficiency of Security, the priority of the lien position in the Security, and the percentage of Guarantee requested; and

(3) Adequacy of the underwriting analysis performed by the Lender in preparing the application and the ability of the Lender to administer the loan in full compliance with the requisite standard of care set forth in § 500.211(b).

(c) *Decisions by the Board.* Upon completion of the evaluation of the application and as soon as possible after the due date, the Board will approve or deny all eligible applications timely received under this Program. The Board shall notify all Applicants in writing of the approval or denial of the Guarantee applications as soon as possible. Approvals for loan Guarantees shall be conditioned upon compliance with § 500.208.

§ 500.208 Issuance of the Guarantee.

(a) The Board's decisions to approve any application for, and extend an offer of, guarantee under § 500.207 is conditioned upon:

(1) The Lender and Borrower obtaining any required regulatory or judicial approvals;

(2) The Lender and Borrower being legally authorized to enter into the loan under the terms and conditions submitted to the Board in the application;

(3) The Board's receipt of the Loan Documents, Guarantee, and any related instruments, properly executed by the Lender, Borrower, and any other required party other than the Board; and

(4) No material adverse change in the Borrower's ability to repay the loan between the date of the Board's approval and the date the Guarantee is to be issued.

(b) The Board may withdraw its approval of an application and rescind its offer of Guarantee if the Board determines that the Lender or the Borrower cannot, or is unwilling to, provide adequate documentation and proof of compliance with paragraph (a) of this section within the time provided for in the offer.

(c) Only after receipt of all the documentation, required by this section, will the Board sign and deliver the Guarantee.

(d) A Borrower receiving a loan guaranteed by the Board under this Program shall pay a one-time guarantee fee of 0.5 percent of the amount of the principal of the loan. This fee must be paid no later than one year from the issuance of the Guarantee.

§ 500.209 Funding for the Program.

The Act provides funding for the costs incurred by the Government as a result of granting Guarantees under the Program. While pursuing the goals of the Act, it is the intent of the Board to minimize the cost of the Program to the Government. The Board will estimate the risk posed by the guaranteed loans to the funds appropriated for the costs of the Guarantees under the Program and operate the Program accordingly.

§ 500.210 Assignment or transfer of loans.

(a) Neither the Loan Documents nor the Guarantee of the Board, or any interest therein, may be modified, assigned, conveyed, sold or otherwise transferred by the Lender, in whole or in part, without the prior written approval of the Board.

(b) Under no circumstances will the Board permit an assignment or transfer of less than 100 percent of the Loan Documents and Guarantee, nor will it

permit an assignment or transfer to be made to an entity which the Board determines not to be an Eligible Lender pursuant to § 500.201.

(c) The proscription under paragraph (a) of this section shall not apply to:

(1) Transfers which occur by operation of law, unless a primary purpose of the transaction leading to such a transfer was to assign, convey or sell the loan note or Guarantee without the necessity of securing the Board's prior written approval; or

(2) An action or agreement by the Lender which has the effect of distributing the risks of the credit among other Lenders if:

(i) Neither the loan note nor the Guarantee is assigned, conveyed, sold, or transferred in whole or in part;

(ii) Both the unguaranteed and guaranteed portions of the loan are treated in the same manner;

(iii) The Lender remains solely responsible for the administration of the loan; and

(iv) The Board's ability to assert any and all defenses available to it under the Guarantee and the law is not adversely affected.

§ 500.211 Lender responsibilities.

(a) *General.* Lender shall comply with all provisions of the Guarantee.

(b) *Standard of care.* The Lender shall exercise due care and diligence in administering the loan as would be exercised by a responsible and prudent banking institution when administering a secured loan of such banking institution's own funds without a Federal guaranty. Such standard shall also apply to any and all approvals, determinations, permissions, acceptances, requirements, or opinion made, given, imposed or reached by Lender.

(c) *Representation to the Board.* In addition to any other representations required by the Guarantee, the Lender shall represent to the Board that it has the ability to, and will, administer the loan, as well as to exercise the Lender's rights and pursue its remedies, including conducting any liquidation of the Security or additional Security in full compliance with the standard of care, without the need for any advice, opinion, determination, recommendation,

approval, disapproval, assistance (financial or other) or participation by the Board, except where the Board's consent is expressly required by the Guarantee, or where the Board, in its sole discretion and pursuant to the Guarantee, elects to provide same.

(d) *Covenants.* With respect to any loan guaranteed by the Board pursuant to the Act and this part, the Lender shall require the Loan Documents to contain such affirmative and negative covenants by the Borrower as are required by the terms and conditions of the Guarantee, such as the prohibition on the payment of dividends.

(e) *Monitoring.* In accordance with the Guarantee, the Lender shall monitor Borrower's performance under the Loan Documents to detect any non-compliance by the Borrower with any provision thereof, and will use its best efforts to cause Borrower's timely correction of any such noncompliance and Borrower's compliance with such provision thereafter.

(f) *Reporting.* With respect to any loan guaranteed by the Board pursuant to the Act and this part, the Lender shall provide the Board with the following information:

(1) Audited financial statements for the Borrower for the prior fiscal year;

(2) Projected balance sheet, income statement, and cash flows for the Borrower for each year remaining on the term of the loan within 60 days of the Borrower's fiscal year end; and

(3) A completed signed copy of Form "Quarterly Compliance Statement," that includes information on the recent performance of the loan, within 15 days of the end of each calendar quarter.

(g) *Notices.* All written notices, requests, or demands made to the Board shall be mailed to the Board at the U.S. Department of Commerce, Washington, D.C. 20230, except as otherwise specified by the Guarantee or as directed by the Board. Lender shall notify the Board in writing without delay of:

(1) Deterioration in the internal risk rating of a loan guaranteed under this Program within 3 business days of such action by the Lender;

(2) The occurrence of each event of default under the Loan Documents or

Guarantee promptly, but not later than 3 business days, of the Lender's learning of such occurrence; and

(3) Any other notification requirements as provided by law, or by the terms of the Guarantee or Loan Documents.

§ 500.212 Liquidation.

(a) The Board may take, or direct to be taken, any action in liquidating the Security which the Board determines to be necessary or proper, consistent with Federal law and regulations.

(b) Pursuant to the Guarantee, upon written demand by the Lender and whether or not the Board has made any payment under the Guarantee, the Board, at the Board's sole option shall have the right to require that the Lender, solely or jointly with the Board, conduct to completion the liquidation of any or all of the Security. The Board may choose to conduct the liquidation itself.

§ 500.213 Termination of Guarantee.

(a) The Board, in its discretion, shall be entitled to terminate all of the Board's obligations under the Guarantee, without further cause, by giving written notice to the Lender of such termination, in the event that:

(1) The closing of the loan shall not have occurred in accordance with the terms and conditions of the Guarantee;

(2) The Guarantee fee required by § 500.208(d) shall not have been paid;

(3) The Lender shall have released or covenanted not to sue the Borrower or any other guarantor, or agreed to the modification of any obligation of any party to any agreement related to the loan, without the prior written consent of the Board;

(4) Lender has released the Board from its liability and obligations under the Guarantee;

(5) Lender has been repaid in full on the loan;

(6) Lender shall have made any incorrect or incomplete representation to the Board in any material respect in connection with the Application, the Guarantee or the Loan Documents; or

(7) Lender failed to comply with any material provision of the Loan Documents or the Guarantee.

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(b) Upon receipt of a written demand for payment made pursuant to the Guarantee, the Board shall be entitled to seek such certifications from the Lender, undertake such audits or investigations, or take such other action as is provided for by law or the Guar-

antee so as to determine whether the Lender has complied with all of the Lender's obligations under the Guarantee.

§ 500.214 OMB control number. [Reserved]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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Material Approved for Incorporation by Reference

(Revised as of January 1, 2000)

The Director of the Federal Register has approved under 5 U.S.C. 552(a) and 1 CFR Part 51 the incorporation by reference of the following publications. This list contains only those incorporations by reference effective as of the revision date of this volume. Incorporations by reference found within a regulation are effective upon the effective date of that regulation. For more information on incorporation by reference, see the preliminary pages of this volume.

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SMALL BUSINESS ADMINISTRATION

13 CFR

American National Standards Institute

11 West 42nd Street, New York, NY 10036 Telephone: (212) 642-4900

ANSI A117.1-1980 American National Standard Specifications for Making Buildings and Facilities Accessible to and Usable by the Physically Handicapped. 113.3-3(c)

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